LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 21 1966
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1049

BERTRAM KRONEN, *Petitioner,*

vs.

PACIFIC COAST SOCIETY OF ORTHODONTISTS, AMERICAN ASSOCIATION OF ORTHODONTISTS, et al, *Respondents.*

Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, First Appellate District

HARTLY FLEISCHMANN
593 Market Street
San Francisco, California 94105
Counsel for Petitioner

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

TABLE OF CONTENTS

	Page
Citation to Opinion Below	1
Jurisdiction	2
Constitutional and Statutory Provisions	2
Questions Presented	7
Statement of the Case	8
Argument	13
I. Respondent Societies Exercise a Public Function and by Permitting and Enforcing Their Exclusion of Him the State of California Has Denied to Petitioner Due Process and Equal Protection of the Laws	13
A. Respondent Societies Are Agencies of the State of California and Have Acted with Its Sanction and Authority to Deprive Petitioner of a Right It Has Previously Given	13
B. The California Courts Have Deprived Petitioner of His Livelihood Without Due Process of Law	18
II. Respondent Societies Have Acted Arbitrarily and in Violation of the Due Process and Equal Protection Clauses in Excluding Petitioner from Membership	19
A. The Requirement of Two Recommendations Is Unreasonable and Has Operated to Deny Petitioner Any Consideration of His Application for Membership	19
B. Other Possible Reasons for Petitioner's Exclusion Are Discriminatory, Unreasonable, Arbitrary and Irrelevant	21

TABLE OF AUTHORITIES

Cases	Pages
Arizona State Board of Medical Examiners v. Clark, 97 Ariz. 205, 398 P.2d 908 (1965)	16, 19, 21
Baldwin v. Morgan, 287 F.2d 750 (5 Cir. 1961)	16
Cason v. Glass Bottle Blowers Association, 37 Cal. 2d 134, 231 P.2d 6 (1951)	16
Colorado State Board of Medical Examiners v. Weiler, 407 P.2d 606 (1965)	16, 19
Evans v. Newton, 34 U.S. Law Week 4078 (January 17, 1966)	16
Falcone v. Middlesex County Medical Society, 34 N.J. 582, 170 A.2d 791 (1961)	12, 15, 19
Herrick, In re, 10 Ill. 2d 357, 140 N.E. 2d 825 (1956)	20
James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944)	12, 14, 15
Kurk v. Medical Society of the County of Queens, Inc. 46 Misc. 2d 790, 260 N.Y.S.2d 520 (Super. Ct. 1965)	13, 15, 19
Lucas v. State of Indiana, 229 Ind. 633, 99 N.E.2d 419 (1951)	20
New Jersey Board of Optometrists v. Nemitz, 21 N.J. Super 18, 90 A.2d 740 (1952)	20
Prosterman v. Tennessee State Board of Dental Examiners, 168 Tenn. 16, 73 S.W.2d 687 (1934)	20
Rice v. Elmore, 165 F.2d 387 (4 Cir. 1947)	16
Robinson v. Florida, 378 U.S. 153 (1964)	17
Salter v. New York State Psychological Association, 14 N.Y. 2d 100, 198 N.E.2d 250 (1964)	12
Schware v. Board of Bar Examiners, 353 U.S. 232 (1957)	18

Pages

Service v. Dulles, 354 U.S. 363 (1957) 18
Shelley v. Kraemer, 334 U.S. 1 (1948) 14
Smith v. Allwright, 321 U.S. 649 (1944) 16
Smith v. Kern County Medical Association, 19 C.2d 263, 120 P.2d 874 (1942) 19
State v. Lonctot, 62 Wash. 2d 845, 384 P.2d 877 (1963) 20

Terry v. Adams, 345 U.S. 461 (1953) 16
Thompson v. City of Louisville, 363 U.S. 199 (1960) 18

Vitarelli v. Seaton, 359 U.S. 535 (1959) 18

Wilson v. Thompson, 183 N.J.L. 57, 83 A. 502 (1912) 17

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 18

STATUTES

Business and Professions Code of the State of California, Sections 1625, 1627, 1630, 1631, 1632; 1670, 1671 and 1680..2, 3, 14, 21

United States Constitution, Amendment XIV 2

MISCELLANEOUS

Annotation, 80 A.L.R. 2d 1355 18

Note, 75 Harvard Law Review, 1187 ..... 18, 21

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

BERTRAM KRONEN, *Petitioner,*

vs.

PACIFIC COAST SOCIETY OF ORTHODONTISTS, AMERICAN ASSOCIATION OF ORTHODONTISTS, et al, *Respondents.*

Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, First Appellate District

Petitioner prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of California, First Appellate District, in this case.

CITATION TO OPINIONS BELOW

The judgment of the Trial Court is unreported. Its judgment, its findings of fact, and its conclusions of law are printed in Appendix A to this petition. The opinion of the District Court of Appeal is printed in Appendix B to

this petition and it is reported in 237 Advance California Appellate Reports, page 369, and in 46 California Reports, 808. No opinions were written on denial of petition for rehearing by the District Court of Appeal or on denial of the petition for hearing by the Supreme Court of California.

JURISDICTION

The judgment of the District Court of Appeal was entered on September 30, 1965. Rehearing was denied on October 19, 1965. A petition for hearing in the Supreme Court of California was denied on November 24, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. U. S. Constitution, Amendment Fourteen, Section 1.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Business and Professions Code of the State of California, Sections 1625, 1627, 1630, 1631, 1632, 1670, 1671 and 1680.

"§ 1625. Definitions; dentistry; practice of dentistry

Dentistry is the diagnosis or treatment, by surgery or other method, of diseases and lesions and the correction of malposed positions of the human teeth, alveolar process, gums, jaws, or associated structures; and such diagnosis or treatment may include the use of drugs,

anesthetic agents, and physical evaluation. Without limiting the foregoing, a person practices dentistry within the meaning of this chapter who does any one of more of the following:

(a) By card, circular, pamphlet, newspaper or in any other way advertises himself or represents himself to be a dentist.

(b) Performs, or offers to perform, an operation or diagnosis of any kind, or treats diseases or lesions of the human teeth, alveolar process, gums, jaws, or associated structures, or corrects malposed positions thereof.

(c) In any way indicates that he will perform by himself or his agents or servants any operation upon the human teeth, alveolar process, gums, jaws, or associated structures, or in any way indicates that he will construct, alter, repair, or sell any bridge, crown, denture or other prosthetic appliance or orthodontic appliance.

(d) Makes, or offers to make, an examination of, with the intent to perform or cause to be performed any operation on the human teeth, alveolar process, gums, jaws, or associated structures.

(e) Manages or conducts as manager, proprietor, conductor, lessor, or otherwise, a place where dental operations are performed.

§ 1627. Practice without license; exemptions; existing licenses. It is unlawful for any person to engage in the practice of dentistry in the State of California, either privately or as an employee of a governmental agent or political subdivision, unless he has obtained a license from the board. The provisions of this act, however, shall not apply to practice by personnel of the Army or Navy or employees of the United States Public Health Service, Veterans' Administration or Indian Affairs when engaged in discharge of official duties.

The license of any dentist, existing at the time of the passage of this chapter, shall continue in force until it expires or is forfeited in the manner provided by this chapter.

§ 1630. Examination in general. The examination by the board of applicants for a license to practice dentistry in this State shall be sufficiently thorough to test the fitness of the applicant to practice dentistry, and both questions and answers shall be written in the English language.

§ 1631. Subjects of examination. The subjects in which the applicant shall be examined shall be such subjects as the board may from time to time prescribe; provided, however, that the subjects of examination shall be selected in accordance with the trend of dental education in California as that trend is determined, from time to time by the curricula of the dental colleges in California approved by the Board of Dental Examiners, and that no examination shall be given on any subject which is not then, at the time of such determination, being currently taught in such approved dental colleges. In the event of any changes in the list of examination subjects, all approved dental schools in the United States shall be notified, by the secretary of the board at least two years in advance of the effective date of such change or changes in subjects. Each applicant, at the time of filing of application to take any examination hereunder, shall be given a list of the subjects of the examination for which he is making application.

§ 1632. Demonstrations of skill; oral examination. The applicant shall give demonstrations of his skill in operative prosthetic dentistry and his written examination may be supplemented by an oral examination.

§ 1670. Discipline in general; grounds and procedure. Any dentist may have his license revoked or suspended or be reprimanded or be placed on probation by the board for unprofessional conduct and any licentiate

under this chapter may have his license revoked or suspended or be reprimanded or placed on probation for gross ignorance, or inefficiency in his profession, or for any other cause applicable to the licentiate provided in this chapter. The proceedings under this article shall be conducted in accordance with Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, and the board shall have all the powers granted therein.

§ 1671. Mental illness

The adjudication of insanity or mental illness, or the voluntary commitment or admission to a state or federal hospital of any licensee for a mental illness shall operate as a suspension of the right to practice of any licensee under this chapter, such suspension to continue until restoration to or declaration of sanity or mental competence. The record of adjudication, judgment or order of voluntary commitment is conclusive evidence of such insanity or mental illness, and upon receipt of a certified copy of any such adjudication, judgment, voluntary commitment or order by the board it shall immediately suspend the license of the person adjudicated or committed. The board shall not restore such license to good standing until it shall receive competent evidence of restoration to or declaration of sanity and until it is satisfied that, with due regard for the public interest, said person's right to practice may be safely reinstated. Before reinstating such person, the board may require the person to pass an oral examination to determine his present fitness to resume his practice.

§ 1680. Unprofessional conduct defined

Unprofessional conduct is defined to be any one of the following:

(1) The employment of persons known as cappers or steerers, to obtain business.

(2) The obtaining of any fee by fraud or misrepresentation.

(3) The willful betrayal of professional secrets.

(4) The employment directly or indirectly of any student or suspended or unlicensed dentist to practice dentistry as defined in this chapter.

(5) The aiding or abetting of any unlicensed person to practice dentistry.

(6) The aiding or abetting of a licensed person to practice dentistry unlawfully.

(7) Habitual intemperance.

(8) Gross immorality.

(9) The use of any false, assumed or fictitious name, either as an individual, firm, corporation or otherwise, or any name other than the name under which he is licensed to practice, in advertising or in any other manner indicating that he is practicing or will practice dentistry.

(10) The practicing or accepting or receiving any commission or the rebating in any form or manner on fees for professional services, radiograms, prescriptions or other services or articles supplied to patients.

(11) The making use of any advertising statements of a character tending to deceive or mislead the public.

(12) The advertising of professional superiority or the performance of professional services in a superior manner.

(13) The advertising of definite or fixed prices for professional services.

(14) The use of advertising containing as a part thereof the representation of a tooth, teeth, bridgework or any portion of the human head.

(15) The employing or the making use of solicitors.

(16) The advertising of any free dental work, or free examination.

(17) The advertising to guarantee any dental service, or to perform any dental operation painlessly.

(18) The willful violation of any of the provisions of law regulating the dispensing and administration of dangerous drugs or narcotics, or the willful violation of any of the provisions of this chapter except the payment of fees.

QUESTIONS PRESENTED

1. May a state through its courts deny relief for failure of a professional society of orthodontists to admit to membership a dentist duly licensed by the state to practice orthodontia and otherwise qualified under the by-laws of the society where membership is held to be an economic necessity and where practice of orthodontia is unethical without it?

2. May membership in a professional society of orthodontists be denied to an applicant who meets all of the professional qualifications specified in its by-laws solely because recommendations of two other members of the society, required by the by-laws and originally obtained by the applicant, are subsequently withdrawn, and may a state court affirm such a denial solely on the basis of such evidence?

3. Is an applicant for membership in a professional society of orthodontists entitled to a hearing on and to consideration of the merits of his application and is it a denial of due process and equal protection of the laws for a state to permit such a society to deny membership to an otherwise qualified applicant without such hearing and consideration?

4. May a state delegate its regulatory powers over the practice of dentistry to or permit their exercise by a private organization and if it does so, is such an organization acting as the state in its exercise of such powers?

5. May a private organization acting for the state in the regulation of the practice of dentistry exclude a qualified applicant who is already duly licensed by the state and may the courts enforce that exclusion solely on the basis of a lack of prior recommendations by other members of the organization? May this exclusion be based further on undisclosed results of an examination given one year previously and never before given to any other applicant so

qualified or on unspecified complaints about the applicant, where the complainants are never identified and where the applicant is never confronted with them?

STATEMENT OF THE CASE

Petitioner is a graduate of New York University Dental School, where he received his D.D.S. Degree. He did post-graduate work in orthodontics at New York University and following 1728 hours of this specialized work he received a certificate in orthodontics. He is and at all relevant times was duly licensed to practice dentistry in the State of California. (CT 21 [Defendants' pre-trial statement]. CT 28 [pre-trial order], CT 31-32 [findings 2, 3 and 4], RT 10, line 8—RT 12, line 3). On January 1, 1962, Petitioner applied for admission to Respondent Pacific Coast Society of Orthodontists. (Plaintiff's exhibit 9, RT 69). Membership in that society automatically carries with it membership in Respondent American Association of Orthodontists. Both are professional associations whose membership is composed of dentists who specialize in orthodontics. The American Association is a Pennsylvania nonprofit corporation, and Pacific Coast Society is a nonprofit unincorporated association which is a constituent society of the American Association. The Pacific Coast Society is one of eight constituent societies of the American Association of Orthodontists, and its jurisdiction extends over the western United States. The Pacific Coast Society is, in turn, divided into three component groups according to geography, and Petitioner applied for membership in the central component, which consists of Northern California, Nevada and Hawaii.

The evidence and the opinion of the District Court of Appeal show conclusively that membership in the Respondent societies is a financial necessity to a dentist who wishes

to specialize in orthodontia (Appendix B, pp. 13, 19-20 and RT 88-93.) Furthermore, the rules of the American Dental Association make it clear that it is unethical for a dentist to hold himself out as limiting his practice exclusively to orthodontia unless he is a member of Respondent societies (Appendix B, pp. 13-14, RT 90-91, plaintiff's Exhibits 12 and 13.)

At the time of his application for membership on January 1, 1962, petitioner had been in the exclusive practice of orthodontics for a period of five years and had been an associate member of the Respondent associations for the time required by their by-laws. Petitioner then met all the educational, professional and experiential requirements listed in Respondents' by-laws. (CT 21, 28, 31-32, plaintiff's Exhibits 1 and 2, RT 23-24.) However, the by-laws of both Respondent societies purported to require that an applicant be "recommended" by two active members of the "constituent society within whose jurisdiction he intends to practice." In addition, there is testimony to the effect that it was the "policy" of the Respondent Pacific Coast Society, to require that the recommendations come from persons practicing in the same locality as the applicant, although this requirement is nowhere specified in the by-laws. (RT 287, compare Plaintiff's Exhibits 8 and 9.) Petitioner's application was indeed signed by two members of Respondent Pacific Coast Society who practiced in the central component but not in the city in which Petitioner practiced. The testimony is uncontradicted to the effect that there were only three orthodontists in Petitioner's city and they all refused to sign his application.

Following discussions between those who had recommended Petitioner, and the Chairman and another member of Respondent's membership committee, which discussions are dealt with in the opinion of the District Court of Appeal

(Appendix B, pp. 8-12), and which are rather vaguely described in the transcript (RT 199-204, 280-286, 291-297, 352-356) the endorsers withdrew their signatures and Petitioner's application for membership was not further considered in any way.

Although Respondents apparently contended at the trial and on appeal that Petitioner's application was still pending, even though the endorsers withdrew their signatures, the testimony is to the contrary. (See especially RT 357, lines 5-10; 358, line 23; 359, lines 1-4.) Furthermore, upon denial of his petition for hearing in the Supreme Court of California, Petitioner received from Respondent Pacific Coast Society the leter which is attached to this petition as Exhibit C, and which terminates his membership. Respondents, through their chief witness, the Chairman of the membership committee of the Pacific Coast Society of Orthodontists, took the position that there was no right whatsoever to membership in that society and that it need not take in any members it did not want. (RT 38, lines 20-25, RT 361, lines 6-9; see also Appendix B, p. 5.) The Trial Court apparently sustained this position, although the findings of fact and conclusions of law are not clear in this respect. The District Court of Appeal in its opinion expressly held that the issues presented by the Complaint were justiciable, that membership in the Respondent societies is an economic and professional necessity which may not be arbitrarily denied, and that Petitioner met the professional and experiential requirements specified in their by-laws. However, that opinion goes on to hold that the lack of endorsers resulting from the withdrawal of the two endorsers described above was itself solely fatal to Petitioner's application for membership and that the endorser requirement was reasonable and not arbitrary. (Appendix B, p. 24.)

Both the Record in this case and the opinion of the District Court of Appeal, refer to other possible grounds of exclusion, though it is not clear that they are at all the basis of decision. For instance, Petitioner had earlier applied for membership in the Respondent societies, on February 28, 1960 (Plaintiff's Exhibit 8, RT 69), at a time when he had not fulfilled the five year experience requirements but when he had not been able to obtain copies of respondents' bylaws (Plaintiff's Exhibit 4, letters of 12/16/61, 12/12/61, 11/21/61, 3/3/61). He was then given a written and oral examination allegedly because of "complaints" about him which had been received by various members of the association, all of whom practiced in his area. No person so qualified had ever been given such an examination before, (RT 323-324, 392) nor, apparently, was the examination given for the reason of the premature application (RT 366.) None of the complaints were specified at the trial in this case and the complainants were not identified (See, for instance, RT 304, lines 1-4, RT 317, lines 5-12, RT 319, 320, RT 374-378) and this was not done previously during Petitioner's associate membership in Respondent societies. Petitioner passed the written part of the examination, but he was told that he had failed the so-called "oral" part of the examination (which, apparently, was not oral at all RT 41, 313, line 12; 322, lines 10-21; 390, lines 8-23.) No reasons for his failure were given then or ever. Having been advised that although there was nothing wrong with his work he should improve his relations in the community and with his fellow practioners (RT 44, 366-368) and then resubmit his application, Petitioner withdrew that first application. Upon this withdrawal, respondent promptly attempted to terminate Petitioner's associate membership, but was forced to change

its position. (Plaintiff's Exhibit 4, letters of 3/6/16 and 3/15/61; RT 80, 178) At the time of his second application, there was no mention either of another examination or of additional complaints, and no attempt was made to give Petitioner a hearing on these matters or to consider them on the merits. To the extent that this first rejection was relied upon by the Respondents and the Trial Court it related solely to earlier events and seems to be irrelevant. The opinion of the District Court of Appeal, while mentioning these circumstances, relies solely on the withdrawal of the endorsers. Nevertheless, brief argument will be directed to these matters in this Petition.

The constitutional issues presented in this Petition for Certiorari are generally raised below in the pleadings (CT 3-7 [Compliant] 11-17, especially p. 14 [Answer]; 23 ¶10 [Defendants' pre-trial statement], 29 ¶5 [pre-trial order] RT 3 [Plaintiff's opening statement].) In addition, the findings and conclusions, especially findings 9-11, state that no unlawful acts were committed by the Respondents, that there was no wrongful refusal to consider Petitioner's second application for membership and, in essence, that the Respondents did not act wrongfully or arbitrarily. The opinion of the District Court of Appeal deals clearly with the constitutional issue, citing cases on the point (i.e. *James v. Marinship Corporation,* 25 Cal.2d 721, 155 P.2d 329 (1944), *Falcone v. Middlesex County Medical Society,* 34 N.M. 582, 170 A.2d 791 (1961),) and relying on others which rejected it (i.e. *Salter v. New York State Psychological Association,* 14 N.Y.2d 100, 198 N.E.2d 250 (1964.)) The constitutional problem is reiterated in the petitions for rehearing (pp. 1-3) and in the petition for hearing in the Supreme Court of California (pp. 1-8.)

ARGUMENT

I. RESPONDENT SOCIETIES EXERCISE A PUBLIC FUNCTION AND BY PERMITTING AND ENFORCING THEIR EXCLUSION OF HIM, THE STATE OF CALIFORNIA HAS DENIED TO PETITIONER DUE PROCESS AND EQUAL PROTECTION OF THE LAWS.

A. Respondent Societies Are Agencies of the State of California and Have Acted with Its Sanction and Authority to Deprive Petitioner of a Right It Has Previously Given.

"Any rule or regulation of a professional society designed or calculated to effect such a purpose must be scrutinized with utmost care to see whether it is not arbitrary and unreasonable and whether in its relationship to the Petitioner it does not violate his right to the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution (Railway Mail Association v. Corsi, 293 N.Y. 315, 56 N.E.2d 721, aff'd., 326 U.S. 88). Not even an honestly held belief that such exclusionary rules are in the public interest warrant the society in adopting and enforcing them if they are violative of the Petitioner's constitutional rights . . . . There may be no public policy which forbids discrimination, fair or unfair, by such social organizations but there is, it seems to me, quite clearly a public policy involved when a medical society, which is in many ways an arm of the state (Education Law, Section 6515, Smith v. Allwright, 321 U.S. 649, 663-664, Baldwin v. Morgan, 287 F.2d 750, 755, Note 9; Wilson v. Thompson, 83 N.J.L. 57, 60, 83 A. 502; Yick Wo v. Hopkins, 118 U.S. 356 (1886) and 75 Harvard Law Review 1187) denies its imprimatur to one licensed by the state to engage in the general practice of medicine if that denial is not based upon the individual's lack of moral integrity, nor upon his individual lack of attainment in his profession, but is based upon the rejection in toto of a general class of physicians called osteopaths. The discrimination thus indulged in is not sanctioned by the state, it is based upon the application of an arbitrary rule which completely disregards the fact that

this Petitioner took the very same State Board's examinations to obtain a license to practice medicine in this state that the members of the Respondent society did . . ." *Kurk v. Medical Society of the County of Queens, Inc.*, 46 Misc. 2d 790, 260 N.Y.S.2d 520 (Sup. Ct. 1965).

"Where a union has, as in this case, attained a monopoly of the supply of labor by means of closed shop agreements and other forms of collective labor action, such a union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living . . ." *James v. Marinship Corporation*, 25 Cal.2d 721, 155 P.2d 329 (1944).

The State of California has established standards for admission to the practice of dentistry, and its license covers orthodontia. Business and Professions Code of the State of California §§ 1625, 1627. California has issued to Petitioner a license which permits him to practice orthodontics. It has also provided for examination and demonstration of skill prior to issuing such a license, Business and Professions Code, Sections 1630, 1631, 1632, and it has established grounds and procedures for revocation of that license, Business and Professions Code, Sections 1670, 1671 and 1680. Nevertheless, Respondent societies here assert the untramelled right, on grounds not specified by the statute, to prevent Petitioner from engaging in his profession. More important, the State, through its Courts, has enforced this right. (cf. *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

Petitioner has been excluded from the Respondent societies, even though the California Court has found that membership is an economic and professional necessity. The consequences of this exclusion from membership are obvious: Expulsion from the American Dental Association for unethical conduct, lack of referrals from other dentists who may feel that Petitioner is not qualified, who may fear professional reprisals or malpractice suit, professional ostracism and social exclusion.

It is clear dentistry and the healing arts generally are proper areas, indeed necessary ones, for the exercise of regulation by a state, and as the foregoing quotations show, a state cannot divest itself of this power by permitting allegedly private organizations to act in derogation of it, nor can it permit such organizations to impose requirements beyond those it establishes. More important, such professional societies may not act arbitrarily to deny one the right to practice his pofession, and they are bound by constitutional principles of due process and equal protection. *Falcone v. Middlesex County Medical Society,* 34 N.J. 582, 170 A.2d 791 (1961), *James v. Marinship Corporation,* supra; *Kurk v. Medical Society of the County of Queens, Inc.,* supra. And compare the following language:

> "It is a fundamental principle of justice that no man may be condemned or prejudiced in his rights without an opportunity to make his defense, and this principle is applicable not only to courts but also to labor unions and similar organizations . . . It is, of course, true that the refined and technical practices which have developed in the courts cannot be imposed upon the deliberations of working men, and the form of procedure is ordinarily immaterial if the accused is accorded a fair trial . . . The union's procedure, however, must be such as will afford the accused member

> substantial justice, and the requirements of a fair trial will be imposed even though the rules of the union fail to provide therefor . . . The authorities recognize that such a trial includes the right to notice of the charges, to confront and cross-examine the accusers and to examine and refute the evidence."
>
> *Cason v. Glass Bottle Blowers Association,* 37 Cal. 2d 134, 231 P.2d 6 (1951).

These principles have also been applied in the medical licensing area. Compare, e.g., *Colorado State Board of Medical Examiners v. Weiler,* 402 P.2d 606, (S.Ct.Colo. 1965); *Arizona State Board of Medical Examiners v. Clark,* 97 Ariz. 205, 398 P.2d 908 (1965).

Petitioner's broad contention here is that private societies may not be permitted to exercise a public function arbitrarily and without observing constitutional requirements. These bodies are acting as an arm of the state in such circumstances and are therefore bound by the provisions of the Fourteenth Amendment. The concept of "state action" has gradually been extended to fields in which the state has or ought to have a legitimate concern with the crucial needs of its citizens and to fields where there has traditionally been state concern. *Evans v. Newton,* 34 U.S. Law Week, 4078 (January 17, 1966); *Smith v. Allwright,* 321 U.S. 649 (1944); *Terry v. Adams,* 345 U.S. 461, (1953); *Rice v. Elmore,* 165 F.2d 387 (4th Cir., 1947); cf. *Baldwin v. Morgan,* 287 F.2d 750 (5th Cir.1961) where the court says:

> "When in the execution of that public function it is the instrument by which state policy is to be, and is, effectuated, activity which might otherwise be deemed private may become state action within the Fourteenth Amendment. And whether it is the state policy is to be determined by the nature of the activity in terms of the governmental nature of the function and not

the mere presence or absence of power in the state's vicarious 'agent' to impose criminal sanctions." 287 F.2d at 755.

And see *Robinson v. Florida,* 378 U.S. 153, 156-157 (1964) and *Wilson v. Thompson,* 183 N.J.L. 57, 83 A. 502 (1912).

All of the foregoing cases demonstrate the increasing breadth of the concept of state action and it is submitted that the practice of medicine or dentistry is just such a legitimate and traditional concern of the state as must be included within this growing area of Federal authority. More particularly, this is a time of increasing specialization in the health field and as the case at bar demonstrates, the practice of specialties is substantially controlled by private bodies beyond the reach of existing legislation who have complete, and as these facts show sometimes arbitrary, control over the economic life, not to mention the health, of many persons. Accordingly, this court should express its views and should recognize the logical and practical terminus of the state action doctrine as including any sort of state sanction for concerted regulatory activities by private organizations in areas previously the subject of state control.

But even if it be conceded that Respondents, as professional societies whose members are specialists, may assure themselves of the qualifications of applicants before they are admitted to membership, and it may be concluded that reasonable steps can be taken to that end. Petitioner argues most strongly, first, that no reasonable standards or procedures for ascertaining his qualification had been established by the Respondent societies except ones specified in the by-laws which he fully met, other than the requirement of having (and keeping) two endorsers. Due process requires

that applications like Petitioner's be handled according to procedures established and published and applicable to all, and not specially devised for one applicant. See Note, 75 Harvard Law Review 1187. In particular, Respondent societies cannot interpose the endorser requirement, especially where the signatures are permitted to be withdrawn, so that the practical effect of the requirement is to deny consideration entirely to an application.

B. The California Courts Have Deprived Petitioner of His Livelihood Without Due Process of Law.

Apart from the state action problem presented by this case, Petitioner also urges that within prior authority it is a denial of due process for state courts to act against him on the basis of wholly insufficient evidence as they have here. The opinion of the District Court of Appeal sustains the action of the Respondent societies on the sole ground that the Petitioner did not have the necessary recommendations on his second application for membership. For the reasons outlined in § II(A) following, this endorser requirement is arbitrary and bears no rational relationship to any conceivable standard of professional qualification. It cannot be the basis for exclusion. It cannot be the basis of a judicial determination that such an exclusion is wrongful. *Thompson v. City of Louisville,* 362 U.S. 199 (1960); *Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957); *Yick Wo v. Hopkins,* 118 U.S. 356 (1886); Annotation, 80 A.L.R.2d 1355.

Even the suggested additional reasons for Petitioner's exclusion, such as the examination and the unspecified complaints, cannot support a judgment for the same reasons and additionally, because they demonstrate that the Respondent societies were not observing their own by-laws. See, for instance, *Service v. Dulles,* 354 U.S. 363 (1957); *Vitarelli v. Seaton,* 359 U.S. 535 (1939).

II. RESPONDENT SOCIETIES HAVE ACTED ARBITRARILY AND IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES IN EXCLUDING PETITIONER FROM MEMBERSHIP.

The law is quite clear that professional societies may not arbitrarily exclude persons from membership if the societies in practical effect control the applicant's livelihood. *Arizona State Board of Medical Examiners v. Clark,* 97 Ariz. 205, 398 P.2d 908 (1965); *Colorado State Board of Medical Examiners v. Weiler,* 402 P.2d 606 (S.Ct.Colo. 1965); *Falcone v. Middlesex County Medical Society,* 34 N.J. 582, 170 A.2d 791 (1961); *Kurk v. Medical Society of the County of Queens, Inc.,* 46 Misc. 2d 790, 260 N.Y.S. 2d 520 (Sup.Ct. 1965). This principle has in fact been followed in California, cf., *Smith v. Kern County Medical Association,* 19 C.2d 263, 120 P.2d 874 (1942). Petitioner argues that none of the possible grounds for his exclusion in this case are reasonable or fairly connected with his current professional qualification to practice orthodontia.

A. The Requirement of Two Recommendations Is Unreasonable and Has Operated to Deny Petitioner Any Consideration of His Application for Membership.

The crucial ground of the opinion below is that Petitioner did not have the number of endorsers required by the by-laws of the Respondent societies. Of course, when he submitted his application, he did have the required signatures, and the society ought to have considered his application, regardless of the subsequent withdrawals. Without, however, arguing the obvious implications of these withdrawals in the circumstances of this case with the concomitant opportunities for "pressure" which are opened up not only in this case but in all others, Petitioner can and does question the validity of such a requirement under any conditions.

It may be that the by-law requirement in question is an attempt to ascertain the quality of an applicant's work,

but it does not effectuate that purpose. It does not explicitly require that an endorser know the applicant's work; it does not require the endorser to acquaint himself with the applicant's work; it does not establish any principles which either assure that such an endorser is himself sufficiently qualified to judge and examine such work or which give the endorser a standard on which to base his judgment. These problems are compounded by the fact that the endorsers must be selected, according to the "policy" of these organizations from among competitors of applicant in his very area of operation. It is here well to note that there were only three orthodontists in petitioner's city and that they all refused to sign his application. Although the law in this area has not developed fully, the Courts have recognized that conflicts of interest may exist. See for instance, *State v. Lonctot,* 62 Wash. 2d 845, 384 P.2d 877 (1963); *In re Heirick,* 10 Ill. 2d 357, 140 N.E.2d 825 (1956) Cert. Den. 355 U.S. 805; *N. J. Board of Optometrists v. Nemitz,* 21 N.J. Super. 18, 90 A.2d 740 (1952); *Lucas v. State of Indiana,* 229 Ind. 633, 99 N.E.2d 419 (1951) Cert.Den. 342 U.S. 919; *Prosterman v. Tennessee State Board of Dental Examiners,* 168 Tenn. 16, 73 S.W.2d 687 (1934).

The main vice of this endorser requirement beyond all others, however, is that it can entirely prevent any consideration whatever of the merits of an applicant's qualifications. In the case at bar, Petitioner has been denied even the most rudimentary consideration of his application, of the alleged complaints against him, and of his qualifications. It is submitted that, especially in the case of a person who meets all of the stated qualifications for membership in societies like the Respondent ones, due process requires that consideration be given to the application regardless of who signs it. At the very least, the Respondent societies

must establish a procedure which guarantees such consideration and which requires them to announce the reasons for their action. See generally: Note, 75 Harvard Law Review, 1187 (1961).

B. Other Possible Reasons for Petitioner's Exclusion Are Discriminatory, Unreasonable, Arbitrary and Irrelevant.

(1) The examination.

The examination given to Petitioner in 1960 by the Pacific Coast Society of Orthodontists was entirely unprecedented, by admission of the society's own president. That examination is unfairly discriminatory and, of course, wholly irrelevant to the rejection of the present application, since it occurred long prior to it, but even considered as part of a completely arbitrary procedure, it could, at most, have formed the basis for requesting another examination, not for complete exclusion. But, Petitioner does not even concede the right of Respondent societies to give an examination at all. The Business and Professions Code of the State of California provides for examinations and occupies this field. §§ 1630-1631. Moreover, petitioner is entitled to know why he failed the examination and he was entitled to have the examination conducted at least according to its terms—that is, that the oral portions be exactly that.

(2) Complaints.

> "Doctor Clark may be refused a license only if he has been guilty of unprofessional conduct and charges have been proven by competent evidence after notice and hearing. He cannot be denied a license to practice in Arizona merely because accusations have been made against him by an out-of-state medical society."
>
> *Arizona State Board of Medical Examiners v. Clark*, 97 Ariz. 205, 398 P.2d 908, 910 (1965).

What has here been asserted by Respondents and affirmed by the District Court of Appeal is that all applicants for membership in Respondent societies shall have the burden of proving their entitlement and that the societies may for any or no reason exclude them. The burden of proof is otherwise as the foregoing quotation indicates. As the trial court itself here ruled, hearsay complaints about the petitioner could originate from any number of sources and for any number of reasons having nothing to do with his actual professional competence. Accordingly, evidence of such complaints was not admitted by the trial court on the merits and could not be a valid basis of decision. Petitioner was never permitted by Respondent societies nor was he permitted by the court to discover the basis for these complaints, if any, nor were the witnesses for the Respondent societies able to identify either the complainants or the reasons for the complaints. It is submitted upon such a showing that the Respondents have not carried any burden of demonstrating the professional incompetence of Petitioner and that the alleged complaints cannot be the ground of exclusion.

(3) "Getting along in the community."

This reason for exclusion, if indeed it was one, is not related to professional qualifications and is nobody's business but Petitioner's. Moreover, here again the endorser requirement is seen at its most vicious. Depending on one's definition of "locality" an applicant's choice of endorsers could be, as it was here, extremely limited and such endorsements could be denied, as they were here solely for such personal and irrelevant reasons as failure "to get along."

It is respectfully submitted that this honorable Court issue and grant a Writ of Certiorari to the District Court of Appeal of the State of California for the First Appellate District to review its decision in an effort to prescribe reasonable grounds and procedures for the handling of applications for membership in the Respondent societies and in others similarly situated.

HARTLY FLEISCHMANN
Attorney for Petitioner

(Appendices Follow)

Appendix A

Filed August 21, 1963
Martin Mongan, Clerk
By R. F. Lippi, Deputy Clerk

(Title of court and cause)

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on March 28, 1963, before the Court sitting without a jury, a jury trial having been expressly waived.

Peter H. Behr, Esq., and Edward J. Boessenecker, Esq., appeared as counsel for plaintiff, and Anthony J. Kennedy, Esq., Anthony M. Kennedy, Esq., and David I. Clayton, Esq., appeared as counsel for defendants. The Court having heard the testimony and considered the evidence both oral and documentary, and having examined the proofs offered by the respective parties, and the cause having been submitted for decision, and the Court being fully advised in the premises makes its findings of fact as follows:

FINDINGS OF FACT

It is true that:

1. The American Association of Orthodontists is a Pennsylvania corporation and that the Pacific Coast Society of Orthodontists and the Pacific Coast Society of Orthodontists Central Component are constituent societies thereof and are non-profit unincorporated professional associations whose membership is composed of dentists specializing exclusively in orthodontics.

2. That plaintiff is a dentist duly licensed by the State of California.

3. That plaintiff is a graduate with a certificate in orthodontics from the New York University School of Dentistry granted in 1950.

4. That plaintiff has been in the exclusive practice of orthodontics for more than five years and was admitted as an associate member of the Pacific Coast Society of Orthodontists in 1957 and that such membership will automatically terminate December 11, 1963, unless plaintiff is admitted to active membership.

5. That plaintiff is not in all respect properly qualified for active membership in the associations set forth in paragraph 1 hereinabove.

6. That plaintiff has not complied with the by-laws of the said association in seeking admission to active membership status therein.

7. That plaintiff did not have proper endorsers and that said endorsers were not properly secured for his application for active membership.

8. That plaintiff has failed and refused to avail himself of all remedies available for relief within the structure of the said associations.

9. That no unlawful conspiracy exists to deny the plaintiff active membership in said associations and that no unlawful acts occurred designed to so deprive plaintiff of active membership.

10. That defendants did not wilfully or without right refuse to consider plaintiff's application for active membership.

11. That no actionable false or fraudulent statements have been made by any of the defendants pertinent to this action and directed to unlawful or improper ends.

12. That plaintiff has been damaged in no actionable way or degree by any of the acts or omissions of defendants.

From the foregoing facts the Court concludes:

CONCLUSIONS OF LAW

1. That no controversy exists justifying declaratory relief in behalf of plaintiff.
2. That plaintiff has no right of membership enforceable in the Courts.
3. That plaintiff has no right to a mandatory injunction.
4. That defendants have no legal obligation to show cause why plaintiff's application for active membership was not or should not be granted.
5. That the complaint of plaintiff be dismissed.
6. That plaintiff pay the costs of defendants.

Let judgment be entered accordingly.

Dated: August 21, 1963.

/s/ H. A. van der Zee
Judge of the Superior Court
H. A. van der Zee

Entered Vol A90 Page 20
Martin Mongan, Clerk

By A. L. McCubben, Deputy Clerk
Filed August 21, 1963
Martin Mongan, Clerk

By R. F. Lippi, Deputy Clerk

(Title of court and cause)

JUDGMENT AFTER TRIAL BY COURT

The above entitled matter came on regularly for trial on March 28, 1963, plaintiff appearing by his attorneys, Peter H. Behr and Edward J. Boessenecker, and defendants appearing by their attorneys, Anthony J. Kennedy, Anthony M. Kennedy, and David I. Clayton, and a jury trial having been duly waived, the Court having heard the testimony and considered the evidence both oral and documentary, and the Court having already filed its Findings of Fact and Conclusions of Law:

It Is Adjudged that plaintiff take nothing by his action, that none of the relief sought in plaintiff's complaint be granted and that said complaint be dismissed and that plaintiff pay the costs of defendants.

Date: August 21, 1963.

/s/ H. A. van der Zee
Judge of the Superior Court

(Certificate of service by mail attached.)

Filed September 3, 1963
Martin Mongan, Clerk
By R. F. Lippi, Deputy Clerk

(Title of court and cause)

Appendix B

Civ. 21818.

District Court of Appeal, First District, Division 1, California.

Sept. 30, 1965.

Bertram Kronen,
Plaintiff and Appellant,

v.

Pacific Coast Society of Orthodontists ex rel.,
Defendants and Respondents.

OPINION

In this action for declaratory and injunctive relief brought by a dentist to secure a determination of his eligibility for active membership in two professional organizations, plaintiff: appeals from a judgment denying him all relief against defendants Pacific Coast Society of Orthodontists (P.C.S.O.) and American Association of Orthodontists (A.A.O.) and various individual defendants, members[1] of said Society and Association.

Plaintiff is a dentist licensed to practice in the states of New York and California. He is forty-four years old. He studied dentistry at New York University where he received his D.D.S. degree in 1945. He became licensed in New York and thereupon entered into the general practice of

1. The individual defendants are Philip L. Konigsberg, secretary of the central component of P.C.S.O., and Jack S. Smithers, Donald R. Poulton, Joel N. Gillespie, William S. Smith and George Hahn, constituting the membership committee of said central component.

dentistry in that city. Shortly thereafter he commenced post-graduate work in orthodontics at New York University and in 1950 received a diploma in that specialty. From 1950 to 1952 he continued with the general practice of dentistry, along with some orthodontic work. From 1950 to 1951 he was an associate professor at a dental college. From 1952 to 1956 he was commissioned as an officer in the U. S. Navy, as a member of the dental corps.

Defendant A.A.O. is a Pennsylvania nonprofit corporation and defendant P.C.S.O. is a nonprofit unincorporated association which is a constituent society thereof. Both A.A.O. and P.C.S.O. are professional associations whose membership is composed of dentists specializing exclusively in orthodontics. P.C.S.O. is one of eight constituent societies of A.A.O. organized on a regional basis and, generally speaking, embraces the Western United States, Alaska, Hawaii, the Philippine Islands and the Province of British Columbia. It is subdivided into three component societies along area lines and the central component consists of the membership in northern California, Nevada and Hawaii. The individual defendants are officers or committee members of the central component. (See fn. 1, ante.)

After plaintiff passed the California State Board examinations and was separated from active duty, he settled in California to practice as a specialist in orthodontics. He did some orthodontic work at first in San Francisco and Oakland and later in Ukiah and Santa Rosa on a part-time basis. Since August 1957 plaintiff has been continuously and exclusively in the practice of orthodontics in Santa Rosa. This area is within the central component of P.C.S.O. Plaintiff was admitted as an associate member of P.C.S.O. in December 1957.

We set forth in footnotes the pertinent by-law provisions of A.A.O.[2] and P.C.S.O.[3] as well as other pertinent regu-

---

2. The by-laws of A.A.O. provide in relevant part as follows:

"Chapter I. Membership—Active Members:

"Section 2. Eligibility of Active Members. (A) A person who is in the exclusive practice of orthodontics [fn. omitted] and who is a member in good standing of his local, state and national dental organizations *may be elected* to membership *through his Constituent Society,* provided the applicant has been: 1. Five years in the exclusive practice of orthodontics, including a successfully completed orthodontic course of a minimum of 1500 hours in an approved dental school. The applicant *must be recommended by two active members* of the Constituent Society within whose jurisdiction he intends to practice; * * *." (Emphasis added.)

"Section 17. Associate members shall consist of the present Associate members in the Constituent Societies and such members who may be elected to this classification of membership by the Constituent Societies in the future in accordance with the eligibility requirements outlined in Chapter XIV—Section 8. They shall receive the official publication without cost. They shall have all of the privileges of active members except those of holding office and voting."

"Chapter XIV. Constituent Societies:

"Section 6. The Standards of eligibility for active and associate members in the Constituent Society shall be the same as those in the Association."

"Section 8. Subsection 6. An *Associate member may be elected* by the Constituent and/or component Society *for a maximum of five years.* If during this period he has not qualified for active membership, his Associate membership shall be terminated. Associate membership shall also terminate one year after the Associate member qualifies for active membership." (Emphasis added.)

3. The by-laws of P.C.S.O. provide in relevant part as follows:

"Chapter I—Membership:

"Section 2. Section A. The minimum qualifications for *active* membership shall be as prescribed by the bylaws of the American Association of Orthodontists, *and, in addition,* the applicant must meet the requirements for *associate membership* in the Pacific Coast Society of Orthodontists. (Emphasis added.)

"Section B. A dentist may be elected to associate membership in this society provided the applicant has successfully completed: 1. an orthodontic course of a minimum of 1,500 hours in a dental school certified by the A.D.A. Council on Dental Education, or * * * 3. in all cases the training must satisfy the membership committee in the component society, and the *applicant must be recommended by two active members of the component to which he applies.*" (Emphasis added.)

lations of P.C.S.O.[4] dealing with the membership requirements of said associations.

On February 28, 1960 plaintiff filled out an application for active membership in the A.A.O. and the P.C.S.O., its constitutent society. His application was endorsed by the same two active members (Drs. Cox and Ballard) who had endorsed his application for associate membership. After waiting several months, he eventually received a letter dated September 26, 1960 from Dr. George Hahn, chairman of the membership committee of P.C.S.O., informing him that his application was to be acted upon by the membership committee at a meeting to be held October 1, 1960. Plaintiff received another letter from Dr. Hahn dated October 5, 1960 advising him that the membership

---

"Section 3. Election to Membership:

A. Application for *active* or associate membership shall be made on the form prescribed by the American Association of Orthodontists, and submitted to the secretary of the component in whose jurisdiction the applicant practices, accompanied by the initiation fee and dues of the component, of this society and of the American Association of Orthodontists for the current calendar year. * * *

"C. Approval by the board of directors confers membership upon the applicant, who shall present himself upon notice by his component society to subscribe to the Pledge and the Code of Ethics, and be inducted into this society."

"Section 7. Termination of Membership:

"C. An associate member upon becoming eligible for active membership shall make application for same. *Associate membership shall automatically terminate one year after eligibility for active membership is reached.*" (Emphasis added.)

"Chapter V. Duties of Standing Committees:

"Section 12. C. Its members shall investigate the eligibility of applicants in their respective components, and report their recommendations to the component."

4. P.S.C.O. adopted certain membership requirements which included *inter alia* the following: "III. ALL APPLICANTS FOR MEMBERSHIP—College or Associate trained. A. In evaluating the qualifications for membership of any applicant, the Membership Committee of the P.C.S.O. *shall satisfy itself that the applicant possesses the necessary knowledge,* both mechanical and biological to render competent orthodontic service." (Emphasis added.)

committee of P.C.S.O. was required to satisfy itself that a candidate for active membership "possesses the necessary knowledge and has proven his ability to render competent orthodontic service" before the committee makes its recommendation to the board of directors. In this letter plaintiff was requested to present himself for examination at the next regular membership committee meeting in February 1961 at which time he would be expected to present certain examples of his work and to answer certain examination questions. Plaintiff testified that upon inquiring by telephone of Dr. Hahn why he was being examined and if this would be required of other applicants with graduate orthodontic training, the latter replied that the membership committee had a perfect right to examine him and did not have to explain why.

There was evidence that plaintiff's application for active membership was discussed at a meeting of the membership committee[5] of P.C.S.O. held in San Francisco in October 1960. Drs. Smith and Hahn, the two committee members from the central component of P.C.S.O. (in which plaintiff practices) had reported that there were numerous complaints about plaintiff's personality and competence. The committee felt that it "should take a closer look at this man" and accordingly decided to exercise its function as a "qualifying committee," which usually examines prospective members who have been studying orthodontics as "preceptees" or apprentices,[6] to ascertain for itself just

---

5. This committee was composed of two persons from each of the three components of P.C.S.O.

6. The A.A.O. and the P.C.S.O. admitted dentists who had not undertaken orthodontic study as a graduate course in a dental college, as plaintiff had, but who had worked with active members for a required number of years in a specified manner, and who submitted themselves to examinations.

what plaintiff's qualifications were. Dr. Muchnic, president of P.C.S.O., testified that the committee's action in having plaintiff submit to an examination was taken pursuant to paragraph III of certain membership requirements prescribed by P.C.S.O. (See fn. 4, ante.) However, since Drs. Hahn and Smith were the only two members of the committee from the central component (where plaintiff practiced) they felt, out of a sense of responsibility to the committee members representing other areas (see fn. 5, ante), that the entire committee should have an opportunity to pass on plaintiff's qualifications.

Plaintiff presented himself for examination by the P.C.S.O. membership committee at the University of California Medical Center in San Francisco on February 25, 1961. In line with the committee's decision the examination was conducted by qualified orthodontists from different areas.[7] Dr. Muchnic testified that plaintiff received the same treatment in his examination as the rest of the applicants being examined at that time. He also testified that it was not necessary to question the applicant on the cases which were exhibited "because the case records speak for themselves," and that they were interested in the results rather than the detailed manner in which he accomplished the results. Dr. Hahn testified that the examination was fair. Plaintiff passed the written test but failed the oral and technical part of the examination.

About March 1, 1961 Dr. Hahn informed plaintiff by telephone that he had failed the examination and also advised plaintiff that if he withdrew his application he would not

---

7. There were six examiners: Dr. Fraser from Seattle, Dr. Chipman from Spokane, Dr. Hahn from Berkeley, Dr. Smith from Richmond, Dr. Spears from Santa Ana and Dr. Muchnic from Beverly Hills.

be considered formally or officially as having failed, the matter would not be published in the society's bulletin and plaintiff could apply for active membership at a later time. Dr. Hahn also suggested that plaintiff return to Santa Rosa, improve his competency as an orthodontist, and improve his relations in that community with his patients and fellow practitioners. He informed plaintiff that "we would give him all of the help that was possible to put him in a position to reapply. * * *" He also invited plaintiff to call upon him for advice with respect to the treatment of his cases or to watch Dr. Hahn treat his own cases. On March 2, 1961 plaintiff sent a letter to Dr. Hahn withdrawing his application and stating that he "would like to apply at a future date." Despite the incident of the examination, plaintiff remained an associate member in good standing.

Dr. Hahn testified that subsequently when plaintiff came to his office, he examined plaintiff's cases critically and made suggestions, showed plaintiff his own work, and advised plaintiff generally how to treat people in a profession dealing mainly with children. He stated that plaintiff's knowledge of orthdontics was satisfactory but his application of that knowledge was not and that he was sincerely trying to help plaintiff so that the latter could qualify for admission to the society. He further testified that if plaintiff had improved himself so as to meet the required standards of A.A.O., he himself would have endorsed plaintiff's application. Dr. Smith testified that two other committee members had advised plaintiff to take specifically named refresher courses.

In December 1961 plaintiff made preparations for filing another application for active membership. He obtained a printed form from P.C.S.O. and filled it out except for the endorsements of two members. He had spoken on the matter

to Dr. Hahn who told him that he would probably have to submit some cases and reminded him that it was essential to have as endorsers two active members practicing in plaintiff's community. Plaintiff asked Dr. Murray Ballard and Dr. Cox, both of Santa Rosa, to endorse his application as they had his first application. Both men refused to do so when plaintiff told each of them that he would not permit them to come to his office to see his procedures and practice. Dr. Cox told plaintiff that there had been unfavorable reports about plaintiff's work and that plaintiff should allow someone to examine it. Plaintiff then approached Dr. Murray Ballard's brother, Dr. E. W. Ballard, the third of the three orthodontists in Santa Rosa who were active members of P.C.S.O. Dr. E. W. Ballard said that he wouldn't sign plaintiff's application unless he were invited into plaintiff's office to observe plaintiff's work but plaintiff apparently did not agree to such an arrangement. There was testimony by Dr. Hahn that it was customary for associate members to permit other orthodontists to visit their offices and give them professional advice.

Having been unsuccessful in his efforts to obtain the above endorsements, plaintiff obtained the signatures of Dr. Walter Straub and Dr. Berthal Hartman, both active members of P.C.S.O. and A.A.O., the former in practice in San Mateo and the latter in San Francisco. He thereupon filed the application with P.C.S.O. in January 1962.[8]

---

8. The following appears at the bottom of the application blank immediately below the signature lines for endorsers: "Note:—Endorsements must be made by members in the locality of the applicant who are members of the Constituent or Component Society where application is being made. Letters of recommendation must be mailed to Constituent Secretary. Constitutional requirements are quoted on reverse side of this blank. All application material must be in the hands of the Secretary not later than 90 days prior to the annual meeting of the Constituent Society."

Dr. Straub testified that when he signed as a sponsor of plaintiff's application for active membership he did not know plaintiff any more than in a casual way, and that he knew that plaintiff had failed the previous examination and that the active members from Santa Rosa had refused to sponsor his application. Dr. Straub had filled out a questionnaire from Dr. Konigsberg, the secretary of the central component of P.C.S.O. dated February 13, 1962, in which Dr. Straub stated that plaintiff's personal character was of high standing, that plaintiff's professional conduct was ethical, that as far as Straub knew, plaintiff was a capable orthodonist and that he (Straub) felt that plaintiff was better "in the society than out." In the questionnaire, Dr. Straub was careful to state that there was "some controversy" about plaintiff's standing with his professional colleagues, that he hoped plaintiff was a worthy applicant; Dr. Straub did not express an opinion based on a visit to plaintiff's office. Dr. Straub testified that it was customary for a sponser of an applicant to spend a day in the applicant's office and that he had erred in signing plaintiff's application without making such a visit since he was not qualified to say what kind of an orthodontist plaintiff was. He had sponsored plaintiff's application because he knew that plaintiff had a complex about not getting along with people and he felt sorry for him, believing he could help plaintiff get over the "hump."

At a meeting of the central component of P.C.S.O. on March 20, 1962, before the membership committee met to act upon the applications pending before it, Dr. Straub withdrew his sponsorship of plaintiff's application. He testified that he did this voluntarily after talking to Drs. Cox and Murray Ballard at the meeting; that he felt that he had made a mistake by not going to plaintiff's office

and making more inquiries about him; that he had signed plaintiff's application "more on a casual basis of acquaintance"; that after talking to Drs. Cox and Ballard he "lost all interest" in plaintiff; that he learned from these doctors that plaintiff had been taping telephone conversations and that plaintiff had been having trouble in his community with his professional colleagues and with his patients and their parents; and that plaintiff had not advised him, when obtaining his signature on the application, that plaintiff had refused to permit either Dr. Cox or Dr. Murray Ballard to visit plaintiff's office. Dr. Straub denied that he had been forced to withdraw his endorsement of plaintiff's application because of threats made by two of the membership committee, Dr. Hahn and Dr. Smith, allegedly implying that the admission into active membership of Dr. Straub's own preceptee might be placed in jeopardy. He admitted that in February 1962, a month before the meeting and the withdrawal of his signature, Dr. Smith telephoned him, while he was at Alta skiing, to inquire why he had signed plaintiff's application in view of the fact that he did not not practice in the same community and never visited plaintiff's office. During this conversation Dr. Smith told the witness that, according to members in plaintiff's locality, plaintiff had trouble with some of his patients. Dr. Straub denied, however, that Dr. Smith suggested in the telephone conversation that the witness withdraw his endorsement and stated that he did so only after talking to Drs. Cox and Ballard. He repeatedly testified that, on the occasion when he withdrew his signature, he accidentally met the last two doctors in a hallway at the meeting, that Drs. Hahn and Smith did not suggest to him that he talk to them, that when he later talked to Drs. Hahn and Smith in a private room the sole topic of conversation was the witness' preceptee and

that no pressure had been put on him to withdraw his endorsement.

Dr. Hartman, the other endorser of plaintiff's application, also withdrew his signature at the P.C.S.O. meeting of March 20, 1962. He had known plaintiff only casually at the time the latter sought his endorsement. He testified that on that occasion plaintiff came to his office with the application, told him that Dr. Straub from San Mateo had signed the application, and when Dr. Hartman protested about his not being in plaintiff's locality, plaintiff said it was all right for any member of the constituent (P.C.S.O.) to sign and it was more convenient to get Dr. Hartman's signature in San Francisco at the time. Dr. Hartman, being extremely busy at the time and becoming agitated, signed the application. Subsequently, Dr. Hartman filled out a questionnaire sent by the secretary of P.C.S.O., noting therein that since plaintiff's office was in Santa Rosa, he was unable to make a visit to it. Dr. Hartman then received a telephone call from Dr. Smith who asked him why he had signed plaintiff's application since he was not in the area where plaintiff practiced, informing Dr. Hartman at the same time that plaintiff had not taken some refresher courses as requested. At the P.C.S.O. meeting of March 20, 1962, Dr. Hartman asked Dr. Smith how he could withdraw his sponsorship of plaintiff's application and after obtaining some paper from Dr. Konigsberg, wrote out his withdrawal in Dr. Konigsberg's presence. Plaintiff learned of Dr. Hartman's action when he received Dr. Hartman's letter dated March 22, 1962 giving two reasons for the withdrawal of the endorsement: first, that he had recently learned of plaintiff's failure to comply with suggestions of the membership committee "to take some refresher courses in Orthodontics" which "indicated, to me at least, that you either felt belligerent toward the men giving the advice or that you did not care"; and

second "simply that I should not be eligible to sign any way, not practicing in your immediate area."

When plaintiff received word of the withdrawal of both endorsements, he discussed the matter on the telephone with both Dr. Smith and Dr. Hahn. These telephone conversations were the only steps taken by plaintiff in the way of voicing his grievances to P.C.S.O., its board or any of its officers after March 21, 1962 and up to the time he filed his complaint on April 27, 1962. Under cross-examination, plaintiff admitted that both doctors had told him that his application had not been denied and that he got the impression they would consider his application anyway when it would come up before the board of directors at their meeting in May 1962. Prior to that time plaintiff commenced the instant action.

On February 21, 1963, almost a year later, plaintiff wrote a letter to the Board of Directors of P.C.S.O., asking the board or the judicial committee to review the actions of the membership committee of the central component in refusing to accept or process his application for active membership and in causing the withdrawal of plaintiff's sponsors from his application. That letter was the only request of any kind which plaintiff made to any official of P.C.S.O. for review of his application. The answer to plaintiff's request was in the form of a letter from defendant's attorney, Mr. Kennedy, to plaintiff's attorney, Mr. Boessenecker, stating in substance that the judicial committee had no jurisdiction over the matter until it was reviewed by the board of directors and that the board of directors would not take action until the instant legal action was disposed of.

Dr. Smith testified that while plaintiff's application without the required endorsers could not be acted upon by the membership committee, nevertheless in actuality plaintiff was not rejected, as he might have been had a properly com-

pleted application been acted upon, and thus remained eligible "so he could go to the courses, and get credit." Dr. Hahn testified to the same effect.

Plaintiff testified that his rejection for membership in defendant organizations would result in an immediate loss of professional standing in his community; that all of his patients were referred by other dentists who measure the ability of an orthodontist by whether he is a member of defendant organizations; that as a result his "supply of patients would be cut off"; and that he would be denied the privilege of ultimate certification by the appropriate qualifying board. There was evidence, and the parties seem to agree, that the American Board of Orthodontics is the only certifying board approved by the American Dental Association[9] having authority to certify a dentist as a diplomate in orthodontics, in other words certifying to his competence to practice orthodontics. For certification as a diplomate, the American Board of Orthodontics requires, *inter alia*, "Active membership in the American Association of Orthodontists for at least two years." The foregoing and other evidence received below was directed to the point that membership in defendant organizations is essential in order that a dentist may announce (e. g., by cards, letterheads, directory listings, etc.) that he limits his practice to orthodontics without violating the Principles of Ethics of the American Dental Association.[10] It was therefore plaintiff's position in the court below, as it is here, that membership

---

9. The record shows that the American Board of Orthodontics was created by the American Society of Orthodontists, now defendant American Association of Orthodontists, and that its authority as a certifying agency was recognized by the American Dental Association through its Council on Dental Education.

10. The particular regulation or canon of ethics permits such an announcement provided the dentist "has met the existing educational requirements and standards set by the American Dental As-

in defendant organizations is indispensable to compliance with the above canon of ethics and that if plaintiff should lose his status as an associate member and not be accepted as an active member, he could not announce his limitation of practice to orthodontics without violating the American Dental Association Principles of Ethics.

In essence it was plaintiff's theory below that, although he had complied with all requirements for active membership, defendants "wilfully and without right" refused to consider his second application filed in January 1962 and conspired together to prevent its being considered by making false and fraudulent representations about plaintiff, thereby causing the withdrawal of endorsements from his application.

The trial court, finding in favor of defendants on all material issues,[11] concluded that "plaintiff has no right of mem-

---

sociation * * * or possesses a state license permitting announcements in an area approved by the American Dental Association." Under the regulation such an announcement would be permitted *only* if the dentist were a diplomate of the American Board of Orthodontists (which requires membership in P.C.S.O. and A.A.O.) *or* if he were a member of, or eligible for membership in, a specialty society officially related to the certifying board approved by the American Dental Association (in other words, the American Board of Orthodontists) this including only P.C.S.O. and A.A.O. *or* if he had a state license in orthodontics. (California's Dental Practice Act (Bus. & Prof. Code §§ 1600-1752) does not license dentists to engage in specialty practice.)

11. The trial court found *inter alia:* "5. That plaintiff is not in all respects properly qualified for active membership in the [defendant] associations * * *; 6. That plaintiff has not complied with the by-laws of the said association in seeking admission to active membership status * * *; 7. That plaintiff did not have proper endorsers and that said endorsers were not properly secured for his application for active membership; 8. That plaintiff has failed and refused to avail himself of all remedies available for relief within the structure of the said associations; 9. That no unlawful conspiracy exists to deny the plaintiff active membership * * *and that no unlawful acts occurred designed to so deprive plaintiff of active membership; 10. That defendants did not wilfully or without right refuse to consider plaintiff's application for

bership enforceable in the Courts"; that plaintiff has no right to a mandatory injunction; that "defendants have no legal obligation to show cause why plaintiff's application for active membership was not or should not be granted"; and that plaintiff's complaint should be dismissed. Judgment was entered accordingly.

Plaintiff's contentions on appeal may be summarized as follows: (1) that the court erred in its conclusion that plaintiff had no right of membership enforceable in the courts; and (2) that the instant record conclusively establishes a conspiracy to exclude him from active membership.

At the outset it is not completely clear to us that the trial court's conclusion that plaintiff had no right of membership enforceable in the courts actually has the crucial significance at this posture of the case that its language imports. As we read the record, the court did not withhold judicial review of the controversy but inquired into the pertinent facts and circumstances, finding no wrongful acts and therefore denying relief. In view of this action by the court, its above conclusion seems to mean that plaintiff was not wronged by defendants, not that plaintiff had failed to show a justiciable cause. Nevertheless we propose to consider first whether the court below acted properly in granting judicial review and secondly whether its disposition of the matter is supported by the evidence.

As a general rule membership in a voluntary association is a privilege which may be granted or withheld by the association at its pleasure, not an enforceable right, and the courts will not interfere to compel admission to membership, no matter how arbitrary or unjust may be the rejection of the candidate. (6 Am.Jur.2d 443-445, 472-473;

---

active membership; 11. That no actionable false or fraudulent statements have been made by any of the defendants pertinent to this action * * *; 12. That plaintiff has been damaged in no actionable way or degree by any of the acts or omissions of defendants."

5 Cal.Jur.2d 463-464; Tatkin v. Superior Court (1958) 160 Cal.App.2d 745, 755, 326 P.2d 201; see 89 A.L.R.2d 964.)

However, the cases have emphasized a distinction between situations involving the expulsion of a member and those involving a refusal to admit him in the first place. In instances of *expulsion,* as distinguished from *exclusion,* the courts have been inclined to grant at least a limited review and, where the expulsion has been wrongfully or arbitrarily brought about, to compel the reinstatement of the member. (See Smith v. Kern County Medical Assn. (1942) 19 Cal.2d 263, 265, 120 P.2d 874; Bernstein v. Alameda etc. Med. Assn. (1956) 139 Cal.App.2d 241, 253, 293 P.2d 862; 89 A.L.R.2d 964, 966.) The principles governing judicial review in such situations were stated in Smith as follows: "In any proper case involving the expulsion of a member from a voluntary unincorporated association, the only function which the courts may perform is to determine whether the association has acted within its powers in good faith, in accordance with its laws and the law of the land. [Citations.]" 19 Cal.2d p. 265, 120 P.2d p. 875) It has been said "that courts are reluctant to interfere in the internal affairs of private voluntary associations . . . [and] rarely grant relief to a person expelled or excluded from a voluntary association." (15 Rutgers Law Review 327, 329.)

By an argument somewhat obliquely presented,[12] plaintiff seems to invoke the more protective influence of the rule dealing with expulsion cases urging that in reality his plight can also be viewed in that category because of his associate membership. We do not believe that plaintiff has a contractual right (see Bernstein v. Alameda etc. Med.

---

12. Plaintiff argues that, being an associate member, his present position is not one of "an outsider attempting to breach a wall" and that because defendants refuse to permit "his advancement to active membership" he actually faces automatic explusion from defendant societies.

Assn., supra, 139 Cal.App.2d 241, 253, 293 P.2d 862; 15 Rutgers Law Review 327, 330-335) to become an active member simply because he has been an associate member. Under the by-laws of A.A.O. (see fn. 2, ante) if he does not qualify for active membership after five years of associate membership, or if he does not become an active member within one year after he qualifies for active membership, his associate membership shall terminate. Under the by-laws of P.C.S.O. (see fn. 3, ante) his associate membership terminates automatically one year after "eligibility" for active membership is reached. There is nothing in the pertinent evidence indicating that active membership in defendant associations in some way derives from or depends upon associate membership so as to impart some right to the former flowing as an incident from the latter. In the instant action plaintiff is not litigating his expulsion as an associate member but his attempted admission as an active member. It is this latter aspect which constitutes the present controversy.

On the issue as to whether this controversy is justiciable the parties have taken sharply divergent positions while seemingly recognizing the applicable legal criteria. Plaintiff concedes that a court will not act to compel admission to a social or fraternal organization but argues that the rule is different in situations involving professional societies' membership which is essential to the right to earn a living. He places special reliance on James v. Marinship Corp. (1944) 25 Cal.2d 721, 731, 155 P.2d 329, 160 A.L.R. 900, and Falcone v. Middlesex County Medical Society (1961) 34 N.J. 582, 170 A.2d 791, 89 A.L.R.2d 952. James held that a union which has "attained a monopoly of the supply of labor * * * may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associa-

tions. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living. [Citations.]" (25 Cal.2d p. 731, 155 P.2d p. 335.) (See also Dotson v. Intl. Alliance etc. Employees (1949) 34 Cal.2d 362, 210 P.2d 5; Cason v. Glass Bottle Blowers Assn. (1951) 37 Cal.2d 134, 231 P.2d 6, 21 A.L.R.2d 1387; Thorman v. Intl. Alliance etc. Employees (1958) 49 Cal.2d 629, 320 P.2d 494.)

In Falcone, the plaintiff, a doctor of osteopathy and a doctor of medicine, was licensed to practice medicine and surgery by the New Jersey State Board of Medical Examiners. Although admitted as an *associate* member of defendant county medical society, plaintiff was refused *active* membership therein because he had not completed four years of study at a medical college approved by the American Medical Association of which defendant society through its state medical society was a component. Hospitals in the area required their staff physicians to be members of the defendant county medical society and upon its refusal to admit plaintiff, dropped him from their staffs. The defendant's refusal of membership thus had "seriously adverse economic and professional effects" (89 A.L.R.2d at p. 958) on the plaintiff.

A judgment ordering his admission to the society was affirmed on appeal. The court, relying *inter alia* upon James v. Marinship Corp., supra, said: "When courts originally declined to scrutinize admission practices of membership associations they were dealing with social clubs, religious organizations and fraternal associations. Here the policies against judicial intervention were strong and there were no significant countervailing policies. When the courts were later called upon to deal with trade and professional associations exercising virtually monopolistic control, different

factors were involved. The intimate personal relationships which pervaded the social, religious and fraternal organizations were hardly in evidence and the *individual's opportunity of earning a livelihood and serving society in his chosen trade or profession appeared as the controlling policy consideration.* * * * Through its interrelationships, the County Medical Society possesses, in fact, a virtual monopoly over the use of local hospital facilities. As a result it has power, by excluding Dr. Falcone from membership, to preclude him *from successfully continuing in his practice of obstetrics and surgery* and *to restrict patients* who wish to engage him as an obstetrician or surgeon in their freedom of choice of physicians. Public policy strongly dictates that this power should not be unbridled but should be viewed judicially as a fiduciary power to be exercised in reasonable and lawful manner for the advancement of the interests of the medical profession and the public generally; * * *" (Emphasis added.) (89 A.L.R.2d at p. 963.)

Defendants make reference to James and Falcone but take the position that neither case is here applicable for the alleged reason that defendant organizations herein do not have such control over the very right to earn a living.[13]

The uncontradicted evidence in the record before us shows that while plaintiff may lawfully practice his specialty of orthodontics in California without being a member of either A.A.O. or P.C.S.O., as previously pointed out, under the canons of ethics of the American Dental Associa-

13. Defendants argue that the instant case falls within the same category as: Hawkins v. North Carolina Dental Society (N. C.1964) 230 F.Supp. 805; Salter v. New York State Psychological Ass'n (1964) 14 N.Y.2d 100, 198 N.E.2d 250; Schwankert v. N. J. State Patrolmen's Benev. Assn. (1962) 77 N.J.Super. 224, 185 A.2d 877; Baltimore County Hospital v. Maryland Hosp. Serv. (1964) 234 Md. 427, 200 A.2d 39.

tion, he may not announce that he limits his practice to orthodontics unless he is a member of defendant organizations. (See fn. 10, ante.) Plaintiff testified that without such membership, his practice would be affected, he would suffer a loss of professional standing, and his supply of patients, depending principally upon referrals from other dentists, would be cut off. In addition he would lose Public Health patients for the treatment of whom such membership is required. It is common knowledge that in this day of specialization, the doctor or dentist limiting his practice to a specialty enjoys a prestigious position with attendant economic advantages. It appears to us on this record that as a practical matter, an orthodontist like plaintiff cannot successfully limit his practice to orthodontics unless he becomes an active member of defendant organizations. These are the realities of the situation.

As we stated previously, the findings of fact and conclusions of law, considered as a whole, indicate not that the court declined to review the case but that it denied relief after having done so. Defendants argue that the court expressly or at least by implication found that membership in defendant organizations was not an economic necessity for plaintiff. An examination of the record discloses no such express finding and, in our view, there is no implied finding to such effect. The pretrial conference order does not list the economic necessity of membership among the issues remaining in dispute. The court found in effect that defendants committed no unlawful acts and did not wilfully or without right refuse to consider plaintiff's application. Considering the conclusion of law in question in the light of the findings, we do not construe it to mean that judicial review was unavailable, for the trial court did grant such review. Whether its consequent denial of relief is supported by the present record is a question we discuss *infra*.

We therefore conclude that it was within the province of the trial court to review and inquire into the facts and circumstances pertinent to the alleged exclusion of plaintiff from defendant organizations to determine whether the power of these groups was exercised arbitrarily or unlawfully in order to prevent plaintiff from successfully practicing orthodontics. (James v. Marinship Corp., supra, 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900; Falcone v. Middlesex County Medical Society, supra, 34 N.J. 582, 170 A.2d 791, 89 A.L.R.2d 952.)

We come now to the second main issue on appeal. The court below having properly inquired into the controversy at hand, we must now determine whether the findings underlying its denial of relief are supported by the evidence or, to state it another way, whether, as plaintiff here contends, the evidence is such as to conclusively establish as a matter of law a conspiracy to exclude him from active membership. We have concluded that the findings are supported and that plaintiff's argument that a conspiracy should be found to exist at this posture of the case is wholly untenable.

The crucial findings which support the judgment are numbers 9 to 11 inclusive (see fn. 11, ante) stating in substance that no conspiracy existed, no unlawful acts were committed to deprive plaintiff of membership, no wrongful refusal to consider plaintiff's second application occurred and no actionable false or fraudulent statements were made. In essence the trial court determined that defendants did not wrongfully or arbitrarily exclude plaintiff from membership.

The evidence summarized by us in considerable detail above, together with the reasonable inferences deducible therefrom, amply supports the above findings and at the same time justifies the judgment. It is reasonably inferable

that plaintiff received no arbitrary or improper treatment at the hands of defendants' representatives; that he was given a fair examination by a representative group of experienced orthodontists; and that, upon his failure to pass it, he was given an opportunity to avoid the publicized stigma of failure, to withdraw his application and remain an associate member and finally, to prepare himself for another test.

At the heart of this controversy is of course the question whether defendants wrongfully brought about the withdrawal of the signatures of plaintiff's sponsors on his second application. The relevant evidence has been set forth above in the light of the familiar rules of appellate review. It was clearly within the province of the trier of fact to accept the testimony of the two doctor sponsors and the related testimony of Drs. Hahn and Smith. The court could reasonably conclude that Drs. Straub and Hartman withdrew their respective signatures in the manner, under the circumstances and for the reasons given by them; that said doctors felt they did not know enough about plaintiff to vouch for his professional competence; and that their decision to withdraw sponsorship was prompted by honest motives and a sense of professional responsibility rather than effected by connivance or pressure on the part of defendants' representatives. In the same way the court could conclude that the activities of Drs. Hahn and Smith in connection with the incident emanated not from a conspiracy, as claimed by plaintiff, but from a sincere sense of responsibility to their profession, the public and even to plaintiff himself. Plaintiff at this posture of the case would have us brush aside all these findings and the manifold inferences embraced within them and indulge in the imperative that they conclusively establish the conspiracy and

nefarious scheming which is the gravamen of his case. No citation of authority is needed to make clear that this court cannot accept such an argument. While plaintiff takes umbrage at the charge, nevertheless it seems clear to us, both from his briefs and oral argument, that he attempts to construct a conspiracy largely through a selective process of favorable evidence, ignoring the plain reality that the trial court, acting within its proper province, has passed upon the credibility of the witnesses and drawn the inferences from their testimony.

Anent this aspect of the case, we take note of plaintiff's claim that orthodontists in his area were unfriendly to him and as part of the charged conspiracy or at least with improper motives refused to sign his application. However the court could properly infer that this resulted not from improper actions but from those of honest professional purpose and upon sound and sincere reasons. Lending support to this is the evidence that plaintiff was given the privilege of a second examination and an opportunity to improve himself in the meantime and the further evidence that the Santa Rosa doctors offered to sign his application if plaintiff would permit them to come to his office and inspect his work. All in all, on this record, it can be reasonably inferred that plaintiff, having decided to reject the opportunities and suggestions made available to him after his first failure, insisted upon proceeding with his second application with the attitude that his qualifications were sufficient and that he should be admitted forthwith without the necessity of submitting his work to the inspection of his colleagues.

It is clear of course that upon withdrawal of plaintiff's sponsors, his application no longer complied with the by-laws and that the court's findings to that effect (findings 6 and 7, see fn. 11, ante) are supported. The crucial question

as to whether this withdrawal was arbitrarily or wrongfully accomplished has already been discussed in detail. Plaintiff thus faces this hard ineluctable fact: Since he was not "recommended by two active members of the Constituent Society within whose jurisdiction he intends to practice" (i.e., P.C.S.O.; see fn. 2, ante) and since he is not "recommended by two active members of the component to which he applies" (i. e., the central component; see fn. 3, ante) he is not qualified for active membership. The various qualifying requirements which have impeded plaintiff's admission to membership in defendant organizations are directed only to his professional qualifications. We cannot say on this record that they are arbitrary or unreasonable or that they have been applied or construed in plaintiff's case in an arbitrary, unreasonable or wrongful manner. We need not discuss whether under the evidence plaintiff has failed or refused to pursue other remedies within the internal structure of defendant organizations since the failure to comply with pertinent by-laws governing his application for membership constitute a fatal disability supporting the court's denial of relief.

The judgment is affirmed.

MOLINARI and BRAY, JJ.,* concur.

---

*Retired Presiding Justice of the District Court of Appeal of the State of California, First Appellate District, Division One, sitting pro tempore under assignment by the Chairman of the Judicial Council.

Appendix C

Received Feb. 4, 1966, Hartly Fleischmann

PACIFIC COAST SOCIETY OF ORTHODONTISTS

[Letterhead]

December 9, 1965

Dr. Bertram Kronen
1049 Fourth Street
Santa Rosa, California

Dear Dr. Kronen:

Your associate membership in the Pacific Coast Society of Orthodontists has been continued until this time by a writ of supersedeas. In view of the fact that the determination of the appeal in Kronen vs. P.C.S.O. et al, is now final your associate membership in the Pacific Coast Society of Orthodontists is now terminated.

Please disregard the notice of dues payable for next year.

Yours truly,

DONALD W. KOSTER

RWK:rr

cc: Alan L. Bonnington
Wm. S. Smith, D.D.S.
George W. Hahn, D.D.S.
Herbert Muchnic, D.D.S.
Warren S. Kitchen, D.D.S.
Malcolm R. Chipman, D.D.S.
Peter Herzog, Esq.
James Brophy

Subject Index

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement of case	3
Argument	10
I	
This court lacks jurisdiction to review the judgment of the District Court of Appeal	10
II	
(A) Respondent Associations are not involved in state action	14
(B) Even though not required, petitioner's constitutional rights were more than adequately protected by respondents	19
III	
There is sufficient evidence to support the action of the California courts and petitioner's constitutional rights were protected by them	21
Conclusion	24

Table of Authorities Cited

Cases	Pages
American Railway Exp. Co. v. Kentucky, 273 U.S. 269, 71 L. Ed. 639	21
American Surety Co. v. Baldwin, 287 U.S. 156, 77 L. Ed. 231	11
Bell v. Georgia Dental Assn., 231 F. Supp. 299	17
Burton v. Wilmington Parking Authority, 365 U.S. 715, 6 L. Ed. 2d 45	15
Chicago I. & L.R. Co. v. Hackett, 228 U.S. 559, 57 L. Ed. 966	10
Cincinnati, N.O. & T.P.R. Co. v. Slade, 216 U.S. 78, 54 L. Ed. 390	11
Evans v. Newton, ... U.S. ....., 15 L. Ed. 2d 373	15
Edelman v. California, 344 U.S. 357, 97 L. Ed. 387	13
Falcone v. Middlesex County Medical Society, 34 N.J. 582, 170 Atl. 2d 791	17
F. G. Oxley Stave Co. v. Butler County, 166 U.S. 648, 41 L. Ed. 1149	10, 11, 12
Flores v. Stone, 21 C.A. 105, 131 P. 348	13
Frey Roofing Co. v. Wood, 344 U.S. 157, 97 L. Ed. 168	22
Gorman v. Washington University, 316 U.S. 98, 86 L. Ed. 1300	13
Hawkins v. North Carolina Dental Society, 34 U.S. Law Week 2428 (1966)	17
Honeyman v. Hanan, 300 U.S. 14, 81 L. Ed. 476	12
James v. Marinship Corporation, 25 Cal. 2d 721, 155 P. 2d 329	17
Kimball v. Kimball, 174 U.S. 158, 43 L. Ed. 932	13
Kurk v. Medical Society of the County of Queens, Inc., 46 Misc. 2d 790, 260 N.Y.S. 2d 520	15
Kurk v. Medical Society of Queens, Inc., 264 N.Y.S. 2d 859 (November, 1965)	15
Lynch v. New York ex rel. Pierson, 293 U.S. 52, 79 L. Ed. 191	12

Pages

Mann v. Brison, 120 C.A. 450, 7 P. 2d 1110 13
Marsh v. Alabama, 326 U.S. 501, 9 L. Ed. 265 17
Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287, 85 L. Ed. 836 22
Mutual Life Ins. Co. of New York v. McGrew, 188 U.S. 291, 47 L. Ed. 480 ..... 10, 11

People v. Blevins, 222 C.A.2d 801, 35 Cal. Rptr. 348 13
People ex rel. Dept. of Public Works v. Mascotti, 206 C.A. 2d 772, 23 Cal. Rptr. 846 13
Portland R. L. & P. Co. v. Railroad Commission, 229 U.S. 397, 57 L. Ed. 1248 22

Salter v. New York State Psychological Association, 140 N.Y. 2d 100, 198 N.E. 2d 250 ..... 17, 18
Simkins v. Moses H. Cone Memorial Hospital, 323 F. 2d 959 17

Tangora v. Matanky, 231 C.A. 2d 468, 42 Cal. Rptr. 348 21
Terry v. Adams, 345 U.S. 461, 97 L. Ed. 1152 17

Codes

28 U.S.C. Section 1257(3) 2, 10

Statutes

U.S. Rev. Stat. Section 709 10

Texts

Principles of Ethics of the American Dental Association: Section 18 ..... 8, 16
6 Am. Jur. 2d 443-444 14

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 1049

BERTRAM KRONEN,
Petitioner,

VS.

PACIFIC COAST SOCIETY OF ORTHODONTISTS, AMERICAN ASSOCIATION OF ORTHODONTISTS, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the District Court of Appeal of the State of California, First Appellate District

---

OPINIONS BELOW

The petition correctly cites or appendices the Findings, Conclusion and Judgment of the trial court and the opinion of the District Court of Appeal. The fact that no written opinions were filed on denial of petition for rehearing or hearing is also correctly stated, as are the dates of denial.

JURISDICTION

Petitioner incorrectly asserts jurisdiction of this Court under 28 U.S.C. Section 1257 (3). Respondents assert, on the contrary, that the Court is without jurisdiction to grant the writ on the grounds that no Federal question was properly raised below, that Respondents are not engaged in State action as claimed, that Petitioner was not denied due process or equal protection, and that decision of the District Court of Appeal is more than adequately supported in the record.

QUESTIONS PRESENTED

1. Does this Court have jurisdiction to review the decision of the District Court of Appeal on writ of certiorari?

Only if this question is answered in the affirmative, then the following questions are presented:

2. Is there any evidence in the record to show that the activities of the respondent societies constitute state action? If so, did Respondent societies deny Petitioner due process and equal protection of the law?

3. Did the California courts deny due process and equal protection of the law to Petitioner, and does the record contain sufficient evidence to sustain the action of the California courts?

STATEMENT OF CASE

Below, Petitioner sought to judicially enforce Respondent associations to accept him into membership. The trial court found in favor of Respondents. (Appendix A to Petition.) The District Court of Appeal affirmed (Appendix B to Petition) and Petitions for Rehearing and for Hearing in the Supreme Court of California were denied. (Hereafter, the opinion of the District Court of Appeal will be referred to as Appendix B.)

Petitioner is a licensed Doctor of Dental Surgery in the State of California, limiting his practice to orthodontics since 1957. Orthodontics is a special branch of dentistry concerning itself with the straightening of teeth. (RT 94:7-11.) It is practiced in the office exclusively (as opposed to hospitals) and the duration of treatment varies with the individual case and the different philosophies of orthodontists. (RT 95:4-6.) Respondents, American Association of Orthodontists (hereafter called A.A.O.) and Pacific Coast Society of Orthodontists (hereafter called P.C.S.O.) are professional associations whose membership is limited to dentists practicing exclusively in orthdontics and who *may* be elected to membership after meeting minimum educational and professional requirements. (Pl. Exs. 1 and 2; Appendix B, footnotes 2, 3 and 4.) Respondent P.C.S.O. is a constituent society of the A.A.O., the national organization, and embraces generally the western portion of the United States. The P.C.S.O. is divided into three component societies, and it is the central component of P.C.S.O.

with which we are here concerned. (Hereafter, emphasis is ours unless otherwise noted.)

Pertinent provisions of the Articles, By-Laws, membership requirements and membership application forms are contained in Footnotes 2, 3, 4, and 8, respectively, of the Opinion of the District Court of Appeal. (Appendix B.) Other footnoted regulations, particularly Footnote 10 relating to announcement of limitation of practice will be discussed hereafter.

Petitioner, who established practice in Santa Rosa, was admitted to associate membership in P.C.S.O. in 1957; his sponsors were Doctors Ballard and Cox from Santa Rosa. (RT 25:13-26:15; Appendix B, pp. 6 and 8.) He applied for active membership on February 28, 1960. (RT 68:12-69:24.) This application was also signed by Doctors Ballard and Cox as endorsers. Following receipt of the application, numerous adverse comments and complaints about his ability and qualifications were received by the membership committee of the P.C.S.O. and the Central Component. (RT 317:5-21; 303:23-304:16; 320:12-18; 372:25-378:23; Appendix B, p. 9.)

In discharging its obligation to the Society and in order to determine whether applicant possessed "the necessary knowledge, both mechanical and biological," the membership committee decided that an examination similar to that given to preceptees should be given to Petitioner. (RT 303:23-306:25; 378:4-23; Appendix B, pp. 9 and 10.) Such investigation was required of the committee (Plaintiff's Exhibit 2—

Members shall Investigate), particularly in view of the adverse comments.

Since Petitioner practiced in a relatively small geographical area, it was decided that the examination should be conducted by the membership committee of the Pacific Coast Society of Orthodontists, not merely the committee of the Central Component. (RT 378:4-23; 303:23-306:25; Appendix B, p. 10.) Petitioner consented and agreed to this examination and actually took it. The examiners were disinterested, qualified and eminent orthodontists from diversified areas. They were: Doctors Emory Fraser of Seattle, Malcolm Chipman of Spokane, George Hahn of Berkeley, William Smith of Richmond, Harvey Spears of Santa Ana, and H. V. Muchnic of Beverly Hills. (RT 309:2-25; Appendix B, p. 10, Footnote 7.) The examination was fairly given without any restrictions. (RT 310:1-20; 318:3-10; Appendix B, p. 10.)

The examination was given in three parts. Petitioner passed the written portion but failed the oral and technical portions. (RT 379:4-14; Appendix B, p. 10.) Since failure of the examination and rejection of membership would require publication in the bulletin and attendant general knowledge in the profession, Petitioner withdrew his application on March 21, 1961 at the suggestion of the membership committee (RT 43:19-44:6; 380:8-381:6; 288:8-25; Appendix B, p. 11), thus avoiding this embarrassment. It was suggested that he return to Santa Rosa and improve his competency as an orthodontist. (Appendix B, p. 11.) The committee offered its good offices

and those of its members to help Petitioner in achieving the "mechanical and biological" knowledge necessary to produce good orthodontic care. Petitioner availed himself of this offer on only one occasion, a single visit to the office of Dr. Hahn. (RT 381:4-382:5.)

Dr. Hahn examined Petitioner criticially and gave advice and suggestions on how to treat people in this profession dealing mainly with children. Dr. Hahn stated that Petitioner's knowledge of orthodontics was satisfactory but his application of that knowledge was not. (Appendix B, p. 11.) Members of the Committee advised Petitioner to take specifically named refresher courses (Appendix B, p. 11) which he did not do. (Appendix B, p. 15.) Even though reminded that it was essential to have as endorsers two active members practicing in his community (Appendix B, p. 12; Footnote 8, p. 12), petitioner instead went so far as to refuse to allow colleagues from his area in Santa Rosa to visit his office and review his work. (RT 57:3-19; 165:22-166:13; 223:6-23.)

Petitioner filed another application for active membership on February 1, 1962. (RT 68:12-69:24.) He asked the Doctors Ballard and Cox to endorse this application. They refused when he would not permit them to come to his office and review his work. (RT 165:22-166:13; Appendix B, p. 12.) The sponsors he did secure were not from the Santa Rosa area where he practiced. Obtaining sponsors from the area where an applicant practices had been a long-standing policy of Respondents (RT 287:1-8, Note to Pl. Exs. 8 and 9;

Appendix B, Footnote 8, p. 12; also 13), and was known to Petitioner. (Appendix B, p. 12.) Failing to obtain sponsors from his own area Petitioner prevailed upon Dr. Straub of San Mateo and Dr. Hartman from San Francisco to sign his application. (RT 223:13-225:1; 242:19-243:11.) These two men subsequently withdrew their sponsorship voluntarily. Both felt they acted hastily in signing the application, did not have sufficient knowledge of Petitioner's ability, did not know he had failed to take the suggested refresher courses, and that Drs. Ballard and Cox had refused to sign, and had not had the opportunity of visiting his office to examine his work. (RT 200:9-201:12; 203:9-16; 212:9-215:4; 225:9-18; 249:5-250:5; Appendix B, pp. 13-15.) Because the Petitioner was then without sponsors, his application was not considered at the membership meeting of the Central Component on March 20, 1962, and it thus remained open "so he could go to the courses and get credit." (Appendix B, p. 17.)

The California District Court of Appeal properly concluded "that plaintiff received no arbitrary or improper treatment at the hands of defendants' representatives; that he was given a fair examination by a representative group of experienced orthodontists; and that, upon his failure to pass it, he was given an opportunity to avoid the publicized stigma of failure, to withdraw his application and remain an associate member and finally, to prepare himself for another test" * * * "that the activities of Drs. Hahn and Smith in connection with the incident" (of with-

drawal of sponsorship) "emanated not from a conspiracy, as claimed by plaintiff, but from a sincere sense of responsibility to their profession, the public and even to plaintiff himself." * * * "that plaintiff was given the privilege of a second examination and an opportunity to improve himself in the meantime and the further evidence that the Santa Rosa doctors offered to sign his application if plaintiff would permit them to come to his office and inspect his work;" * * * and "that plaintiff, having decided to reject the opportunities and suggestions made available to him after his first failure, insisted upon proceeding with his second application with the attitude that his qualifications were sufficient and that he should be admitted forthwith without the necessity of submitting his work to the inspection of his colleagues. (Appendix B, p. 26:7.)

At the time of trial herein (some three years ago), Section 18 "Announcement of Limitation of Practice" of the Principles of Ethics of the American Dental Association (hereafter referred to as Section 18), reads as appears in plaintiff's exhibits 12 and 13. It was solely on this basis that the District Court of Appeal found that membership in Respondent Associations constituted an economic necessity. While we disagree with that interpretation, the question is now moot in view of the subsequent changes in Section 18 (see our Appendix A hereto).

Section 18 (eliminating the portions not pertinent here), presently in force and effect, provides that a dentist who "limits his practice to one of the special

areas approved" by the A.D.A. (orthodontics is one of the areas approved) may announce his limitation of practice "provided at the time of the announcement, he has met the existing educational requirements and standards * * *" set by the A.D.A. for those wishing to so announce such limitation.

Those standards set by the A.D.A. are:

> (1) Area of practice must be approved (orthodontists; (2) The dentist's practice must be limited (Petitioner's is so limited); and (3) "The dentist must have completed two or more academic years of advanced education as specified by the certifying boards, essentially all of which must be in or directly related to the selected area, * * *".

The third standard quoted above is the one that is crucial in this case. It is undisputed that Petitioner has completed two or more academic years of the required advanced education. Having satisfied all requirements for ethical announcement of his limitation of practice, the holding of "economic necessity for membership" must fall and this issue is now moot.

ARGUMENT

I

THIS COURT LACKS JURISDICTION TO REVIEW THE JUDGMENT OF THE DISTRICT COURT OF APPEAL.

Petitioner asserts that the jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). (Petition for a Writ of Cert. p. 2.) It is the position of Respondents that this Court does not have jurisdiction to review the judgment of the District Court of Appeal of the State of California by writ of certiorari because the record does not show that a title, right, privilege, or immunity was "specially set up or claimed" in the state court as belonging to Petitioner under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States as required by 28 U.S.C. Section 1257 (3). (*F. G. Oxley Stave Co. v. Butler County,* 166 U.S. 648, 653, 41 L. Ed. 1149, 1151, decided under U.S. Rev. Stat. § 709 from which 28 U.S.C. 1257 is derived; *Mutual Life Ins. Co. of New York v. McGrew,* 188 U.S. 291, 310, 47 L. Ed. 480, 485; *Chicago I. & L.R. Co. v. Hackett,* 228 U.S. 559, 57 L. Ed. 966.)

Petitioner raised the question of the alleged violation of his constitutional rights for the first time in his Petition for Rehearing before the District Court of Appeal of the State of California. (Pet. for Rehearing, p. 2.) Where a federal question is raised for the first time in a petition for rehearing in a state Appellate Court and there had been ample opportunity to present the question earlier as being one arising under the Fourteenth Amendment the federal

claim cannot serve as the basis for review by the United States Supreme Court. (*American Surety Co. v. Baldwin,* 287 U.S. 156, 163, 77 L. Ed. 231, 236.)

Nowhere in Petitioner's pleadings, pre-trial statement, argument before the trial court, or in his opening or reply brief on appeal did he "specially set up or claim" any title, right, privilege or immunity under the Constitution of the United States. Surely Petitioner had ample opportunity to do so prior to the filing of his Petition for Rehearing before the California District Court of Appeal.

The proper time and the proper way for setting up this right is in the trial court. (*Mutual Life Ins. Co. of New York v. McGrew,* supra.) The record of the trial court filed herein clearly discloses that there was no reference to the Constitution of the United States or any claimed violation of due process or equal protection by Respondents.

Where the assertion of a Federal right was not urged in the trial court, or called to the attention of, or decided by, the Appellate Court there is no Federal question before this Court. (*Cincinnati, N.O. & T. P. R. Co. v. Slade,* 216 U.S. 78, 54 L. Ed. 390.)

As was said by Justice Harlan in *F. G. Oxley Stave Co. v. Butler County,* supra, at page 655:

> "The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission, or authority of the United States, he must so declare; *and unless he does so declare 'specially,'*

that is, unmistakably, this court is without authority to reexamine the final judgment of the state court." (Emphasis ours.)

The statutory requirement under 28 U.S.C. 1257(3) is not met if the declaration is so general in its character that the purpose of the party to assert a federal right is left to mere inference. (*F. G. Oxley Stave Co. v. Butler County,* supra.) Petitioner only made a general assertion that ". . . plaintiff's constitutional rights were violated . . ." (Pet. for Rehearing, p. 2) without making it unmistakably clear what portion of what Constitution was allegedly violated. The asserted constitutional right, whether it was federal or state and what it was, was left to inference, conjecture and surmise.

Furthermore, it does not affirmatively appear in the record that the federal question was presented to the highest state court; that its decision of the federal question was necessary to the determination of the cause; and that it was actually decided or that the judgment as rendered could not have been given without deciding it. Where the above requirements have not been met this Court is lacking in jurisdiction. (*Lynch v. New York ex rel. Pierson,* 293 U.S. 52, 54, 79 L. Ed. 191, 193; *Honeyman v. Hanan,* 300 U.S. 14, 18, 81 L. Ed. 476, 479.)

In addition the Supreme Court of the United States is without power to decide whether or not Constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the

requirements of state law. (*Edelman v. California,* 344 U.S. 357, 358, 97 L. Ed. 387, 391.) A point made for the first time in a petition for rehearing (as was done here) will not be considered by the California courts. (*Flores v. Stone,* 21 C.A. 105, 111, 131 P. 348; *Mann v. Brison,* 120 C.A. 450, 452, 7 P. 2d 1110; *People ex rel. Dept. of Public Works v. Mascotti,* 206 C.A. 2d 772, 779, 780, 23 Cal. Rptr. 846; *People v. Blevins,* 222 C.A.2d 801, 805, 35 Cal. Rptr. 348 (headnote 6).

This Court is also without jurisdiction to pass on a question that is moot. (*Kimball v. Kimball,* 174 U.S. 158, 43 L. Ed. 932.) The question of economic necessity herein has become moot in view of the new Section 18 of the Principles of Ethics of the American Dental Association (our Appendix A) which no longer makes it unethical for Petitioner to announce his limitation of practice to orthodontics.

Having failed in his burden to show that the U. S. Supreme Court has jurisdiction to review the judgment of the state court (*Gorman v. Washington University,* 316 U.S. 98, 101, 86 L. Ed. 1300, 1302) the petition should be denied.

II

(A) RESPONDENT ASSOCIATIONS ARE NOT INVOLVED IN STATE ACTION.

With respect to voluntary membership associations, the general rule has consistently been stated as follows:

> "Membership in a voluntary unincorporated association is a privilege which may be accorded or withheld, and not a right which can be gained independently and then enforced. The grant or refusal of membership is within the complete control of the association, and the courts cannot compel the admission of an individual into such an association. If his application is refused, he is entirely without legal remedy, no matter how arbitrary or unjust may be his exclusion." (6 Am. Jur. 2d 443-444.)

Exceptions to this well-established rule have been made where a private voluntary organization, through its own actions or the actions of the State, has become involved in what has been variously described as "State action", "Economic necessity" or "Monopoly". These conditions have been found to exist only where the state has delegated, directly or indirectly, to a private organization some governmental function normally reserved to the State, or where a private organization, by activities on its own part, acquires a quasi-public status, such as the right to control one's ability to earn a living in his chosen field. None of these conditions, we submit, exists here.

Petitioner's conclusionary arguments in his petition are wholly unsupported and completely without merit. The case upon which he principally relies, *Kurk v. Medical Society of the County of Queens, Inc.*, 46 Misc. 2d 790, 260 N.Y.S. 2d 520 (a trial court decision) has been overruled. In overruling the trial court, the New York Appellate Division held that the medical society there involved was not so clothed with a public interest or State action as to permit the Applicant to compel judicial admission. (*Kurk v. Medical Society of Queens, Inc.*, 264 N.Y.S. 2d 859, November, 1965.)

Petitioner is not, as claimed, prevented from practicing his profession, nor even his chosen specialty within that profession. (Section 18.) Respondents have no control over the practice of dentistry nor the practice of orthodontics (except for the high ethical standards that it maintains for its own members).

In this case none of the factors visiting "State action" on other organizations in cases cited by Petitioner are present here. Whether or not a particular activity constitutes State action " * * * can be determined only in the framework of the peculiar facts or circumstances present * * *". (*Burton v. Wilmington Parking Authority*, 365 U.S. 715, 726, 6 L. Ed. 2d 45, 52; *Evans v. Newton*, ... U.S. ....., 15 L. Ed. 2d 373 at 377.)

While arguing a negative is difficult, we submit that the record here clearly shows that Respondents are in no way clothed with State action. It does not

in any way control or even advise in selection of members of the State Board of Dental Examiners, or any other Commissions or Councils. It does not furnish a list of nominees to any governmental agencies for such selections. It receives no state or federal funds. While it has rules and regulations and principles of ethics applicable to its own members, it has no control over non-members. It has no powers, either directly or indirectly, over the granting or revoking of licenses to practice dentistry.

Orthodontics is practiced in the office and not in hospitals. Patients are derived in part from other dentists and in good part from other patients and their families. Respondents can not in any way control Petitioner's right to continue the practice of orthodontics. His continued practice thereof and announcement of limitation of practice were never limited or interfered with by Respondents, and are now clearly ethical under Section 18 of the Principles of Ethics of the American Dental Association, an organization over which Respondents have no control. The record clearly discloses that he has received and continues to receive patients from other dentists in his locality, and has received cases from other orthodontists in the area. The record further discloses that he is a prominent member of the International Association of Orthodontists.

The above, we submit, clearly demonstrates that these Respondents are not engaged in State action, monopoly, nor is membership therein an economic necessity. The above also demonstrates that the "frame-

work" of the peculiar facts or circumstances present takes this case out of those relied on by Petitioner and others of a similar nature.

The following cases on the facts alone are clearly distinguishable from the instant case: (1) *Hawkins v. North Carolina Dental Society,* 34 U.S. Law Week 2428 (1966) (Society indirectly appointed members to State Boards, Commissions and the like. Held, state action, and racial discrimination improper); (2) *Bell v. Georgia Dental Assn.,* 231 F. Supp. 299 (Governor's statutory authority to appoint Board members only from a list of nominees submitted by the association); (3) *Simkins v. Moses H. Cone Memorial Hospital,* 323 F. 2d 959 (Federal Hospital construction funds given to state and in turn passed on to the hospital); (4) *Terry v. Adams,* 345 U.S. 461, 97 L. Ed. 1152 (Delegation by state to private groups of certain aspect of state elective process); (5) *James v. Marinship Corporation,* 25 Cal. 2d 721, 155 P. 2d 329 (Discrimination in membership of labor union having monopoly over supply of labor); (6) *Falcone v. Middlesex County Medical Society,* 34 N.J. 582, 170 Atl. 2d 791 (Surgeons membership in Medical Society controlling admission to staff membership in hospitals); (7) *Marsh v. Alabama,* 326 U.S. 501, 9 L. Ed. 265 (Suppression of free speech in a company owned town of over 1500).

The case most clearly in point here is that of *Salter v. New York State Psychological Association,* 140 N.Y. 2d 100, 198 N.E. 2d 250. In that case it was held that the New York State Psychological Associa-

tion was not in fact the State, and its activities in denying membership to plaintiff did not involve State action. The plaintiff was a psychologist of some repute and was certified as such under New York law. The Association was the most important association of psychologists in the state and acted as spokesman for the profession. Eight members of the Association's Board of Directors were members of the State's Advisory Council and aided in formulating State policies. The Association worked closely with the Advisory Council, made recommendations to the council on matters of ethics, revision of State law and the like. The contention that the Association was, in effect, the State and, therefore, its refusal to admit plaintiff to membership was a violation of the Fourteenth Amendment, was rejected. The court passed squarely on the question of whether the Association was so nearly "an arm of the State itself that equal protection and due process constitutional requirements make it unlawful for it to reject qualified and certified applicants." In holding that the Association was not, "in fact, the State" the court stated that such claim was "far fetched". Even though there was close cooperation between the Association and the State's own Advisory Council, the Court noted that "cooperation and leadership, advice and reliance on advice —these are shown, but not shown is delegation by or agency of the State".

We submit that the *Salter* case makes a much stronger showing of potential State action than this case. Even so, that claim was there rejected. Here,

there is no showing (and not even a claim) that these Respondents, or any of their officers (as officers of Respondents), are officially or unofficially connected with any State agency, work closely with any State agency or make any recommendations to State agencies concerning State law or otherwise. There is, we submit, a complete failure of Petitioner's claim of State action.

(B) EVEN THOUGH NOT REQUIRED, PETITIONER'S CONSTITUTIONAL RIGHTS WERE MORE THAN ADEQUATELY PROTECTED BY RESPONDENTS.

Assuming, without conceding, that the due process and equal protection provisions of the Fourteenth Amendment extended to the activities of Respondents in excluding Petitioner from membership, we submit that their mandate has been complied with. Petitioner was not, as claimed, excluded because of the so-called adverse comments or hearsay complaints. On the contrary, his exclusion was based solely on lack of professional competence, his refusal to accept advice concerning improvements, his refusal to permit observation of his work and his failure to follow reasonable requirements concerning his second application.

After receipt of the first application, and after receiving the adverse comments (more than ever before with any other applicant), the Committee decided to "take a closer look at" Petitioner in order to assure itself that he did have the necessary and adequate mechanical and biological knowledge. The decision was made to give him an examination, to which he

agreed, by the entire Membership Committee of the P.C.S.O. This examination he failed in two out of three parts. He was tried (if that term may be loosely applied) on his professional competence exhibited by him at the examination—not on what others said about him. His first application was withdrawn to obviate publicity and embarrassment.

Following Petitioner's failure of this examination, refresher courses were suggested but not taken. Offers of help from Committee members were rejected but with one exception (the lone visit to Dr. Hahn's office). On the second application he refused to allow the Drs. Ballard and Cox to come to his office to see his practice, a customary procedure on all applicants.

Instead, Petitioner secured endorsers from other communities, knowing that this was in violation of the policies and practices of Respondents. (He was told this by Dr. Hahn, had on two previous applications secured local endorsers, and the requirement clearly appears on the application form supplied by Respondents A.A.O. in accordance with the by-laws.) In securing these endorsers, Petitioner failed to advise them that Orthodontists in his community had refused to sign, that he had refused these local orthodontists permission to come to his office and observe his practice, that he failed to take the refresher courses previously suggested, and had failed to accept other offers of help. These sponsors later, realizing that they should not have signed since they were not from Petitioner's community and had not observed his practice and procedures, voluntarily withdrew their

sponsorship upon learning of these additional facts withheld by Petitioner.

Based on these indisputable facts, it clearly appears that Respondents gave Petitioner every opportunity to become professionally qualified, and that these opportunities were rejected. The Fourteenth Amendment requires no more than fair and equal opportunity and consideration. This and more was done in Petitioner's case. His failure to obtain admission rests squarely on his own failures, and not on any unfair or unreasonable actions of Respondents.

III

THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE ACTION OF THE CALIFORNIA COURTS AND PETITIONER'S CONSTITUTIONAL RIGHTS WERE PROTECTED BY THEM.

Unless the decision of the District Court of Appeal amounts to a mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental principles which have been established for the protection and enforcement of private rights this Court cannot interfere. (*American Railway Exp. Co. v. Kentucky,* 273 U.S. 269, 71 L. Ed. 639.)

It is a well settled principle of California law that the Appellate Court, when reviewing the findings of a trial court, begins with a presumption that they are supported by the evidence, and it is incumbent upon the appellant to demonstrate that there is no substantial evidence to support the challenged findings. (*Tangora v. Matanky,* 231 C.A. 2d 468, 471, 42 Cal.

Rptr. 348.) It was within this rule that the District Court of Appeal reviewed and sustained the findings of the trial court. The substantial evidence to support these findings has been shown by Respondents in II (B) supra. Petitioner was given a fair examination which he failed; failed to secure the proper endorsers; refused to take refresher courses and other offers of help; and would not allow anyone to come to his office and review his work.

Where the facts found by the trial court are adopted by the highest state court and, as shown supra II(B), are supported by substantial evidence, this Court will not ordinarily reexamine them. (*Portland R. L. & P. Co. v. Railroad Commission,* 229 U.S. 397, 57 L. Ed. 1248.)

In *Frey Roofing Co. v. Wood,* 344 U.S. 157, 97 L. Ed. 168, Petitioner contended that the findings of the state court were without evidential support. This Court accepted the findings as they were not without factual foundation, and there were no exceptional circumstances to justify their rejection.

Furthermore, where the trial judge bases the findings upon conflicts and interpretations of the testimony, and reasonable inferences to be drawn therefrom, this Court, in exercising judicial review, will not ordinarily make an independent evaluation of that testimony and substitute its judgment. (*Milk Wagon Drivers Union v. Meadowmoor Dairies,* 312 U.S. 287, 85 L. Ed. 836.)

Petitioner's cause was heard by the trial court sitting without a jury. The judge had the opportunity

to hear and weigh the testimony offered by both sides, and to draw his inferences therefrom to support his findings. His findings, as stated in the opinion of the District Court of Appeal were amply supported by the evidence. (Appendix B, p. 25.)

Petitioner's further contention that the action of Respondents was sustained by the District Court of Appeal opinion "on the sole ground that the Petitioner did not have the necessary recommendations . . . ." is equally without merit. On the issue of whether or not the findings and judgment of the trial court was supported by the evidence the District Court stated:

> "The evidence summarized by us in considerable detail above, together with the reasonable inferences deducible therefrom, amply supports the above findings and at the same time justifies the judgment." (Appendix B, p. 25.)

Petitioner also argues that the endorser requirement is in no way related to his professional qualifications. The District Court of Appeal rejected this point by stating:

> "The various qualifying requirements which have impeded plaintiff's admission to membership in defendant organizations are directed only to his professional qualifications." (Appendix B, p. 28.)

The endorser requirement enables those in the area or community in which an applicant intends to practice to visit his office and see his work in an effort to determine whether or not they can properly endorse

him pursuant to the by-laws of the Respondent societies. It is most reasonable and fair.

CONCLUSION

Respondents respectfully submit that this Court is without jurisdiction to review the judgment of the District Court of Appeal and that the activities of Respondents do not constitute state action.

On the other hand if this Court finds in favor of Petitioner on these two issues, we submit that the action of Respondents and the District Court of Appeal was not unreasonable or arbitrary and therefore did not deny Petitioner due process and equal protection of the law.

Respondents respectfully request that this Court deny the Writ of Certiorari.

Dated, April 1, 1966.

THOMAS L. CROFT,
PEART, BARATY & HASSARD,
ALAN L. BONNINGTON,
Attorneys for Respondents.

(Appendix A Follows)

AMERICAN DENTAL ASSOCIATION

211 East Chicago Avenue • Chicago, Illinois 60611 • Area Code 312, WHitehall 4-6730

PRINCIPLES OF ETHICS OF THE AMERICAN DENTAL ASSOCIATION SECTION 18

Section 18. Announcement of Limitation of Practice. -- Only a dentist who limits his practice exclusively to one of the special areas approved by the American Dental Association for limited practice may include a statement of his limitation in announcements, cards, letterheads and directory listings (consistent with the customs of dentists of the community), provided at the time of the announcement, he has met the existing educational requirements and standards" set by the American Dental Association for members wishing to announce limitation of practice or posesses a state license permitting announcement in an area approved by the American Dental Association.

In accord with established ethical ruling that dentists should not claim or imply superiority, use of the phrases "Specialist in....." or "Specialist on...." in announcements, cards, letterheads or directory listings should be discouraged. The use of the phrase "Practice limited to....." is preferable.

*The following are included within the standards of the American Dental Association for determining the educational experience and other appropriate requirements for announcing a limited practice:

1. The indicated area of dentistry must be one for which there is a certifying board approved by the American Dental Association.
2. The dentist's practice must be limited exclusively to the indicated area of dentistry.
3. The dentist must have completed two or more academic years of advanced education as specified by the certifying boards, essentially all of which must be in or directly related to the selected area, or possess a state license permitting announcement in an area approved by the American Dental Association.

CERTIFICATION

I, the undersigned, Harvey Sarner, do hereby certify that I am the duly appointed secretary of the Judicial Council of the American Dental Association, which Judicial Council enforces the Principles of Ethics of the American Dental Association. I further certify that the above is a true copy of section 18 of the Principles

Principles of Ethics of the American Dental Association Section 18

Certification (continued)

of Ethics which section was adopted by the House of Delegates of the American Dental Association in November, 1961 and which became effective January 1, 1965, and I do further certify that section 18 as it appears above is now in full force and effect.

IN WITNESS HEREOF, I hereunto set my hand this fourth day of March, 1966.

Harvey Sarner

Harvey Sarner
Secretary, Judicial Council
American Dental Association